115-413

Supreme Court of the United States.

OCTOBER TERM, 1884.

ORIGINAL NO. 6.

THE STATE OF ALABAMA,

vs.

ISAAC T. BURR, *et als.*

DEMURRER OF ISAAC T. BURR.

In the Supreme Court of the United States.

October Term, 1884.

The First day of April, A. D. 1885.

ISAAC T. BURR ET ALS,
ats.
STATE OF ALABAMA.

THE defendant, ISAAC T. BURR, by his attorney, Benjamin F. Brooks, demurs to the plaintiff's declaration, and says that the said declaration and the matters therein contained in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have its action against this defendant: For that,

First. The plaintiff's remedy, if any exists, is obtainable only in a Court of Equity.

Second. That it is obtainable only in the Courts of the State of Alabama.

Third. That the plaintiff has joined different and distinct causes of action not properly united in the same suit.

Fourth. There is a defect in the persons joined as parties defendant in said suit.

Fifth. That it appears that this Court has no jurisdiction in the premises.

Wherefore for want of a sufficient declaration this defendant prays judgment.

BENJAMIN F. BROOKS,
Attorney and Counsel for ISAAC T. BURR.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

BENJAMIN F. BROOKS,
Attorney and of Counsel.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, } ss.

I, Isaac T. Burr, being duly sworn, depose and say that I have read the foregoing demurrer to the declaration in said suit, in which I am one of the defendants, and that said demurrer is not interposed for purposes of delay.

ISAAC T. BURR.

Subscribed and sworn to before me, this thirtieth day of March, 1885.

LAWRENCE BOND,
Notary Public.

NOTARIAL SEAL.

115-413

In the Supreme Court of the United States.

[Filed April 1, 1885.]

OCTOBER TERM, 1885.

NO. 4, ORIGINAL.

THE STATE OF ALABAMA

vs.

ISAAC T. BURR, JOHN C. STANTON, DANIEL N. STANTON, JOHN DEMERITT AND SAMUEL A. CARLETON.

DEMURRERS OF JOHN C. STANTON, DANIEL N. STANTON, JOHN DEMERITT.

R. O. POLKINHORN & SON, PRINTERS.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

The day of April, A. D. 1885.

STATE OF ALABAMA

vs.

ISAAC T. BURR ET ALS.

THE defendant, Daniel N. Stanton, by his attorney, demurs to the plaintiff's declaration, and says that the said declaration and the matters therein contained in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have its action against this defendant: For that,

First. The plaintiff's remedy, if any exists, is obtainable only in a Court of Equity.

Second. That it is obtainable only in the Courts of the State of Alabama.

Third. That the plaintiff has joined different and distinct causes of action not properly united in the same suit.

Fourth. There is a defect in the persons joined as parties defendant in said suit.

Fifth. That it appears that this Court has no jurisdiction in the premises.

Wherefore for want of a sufficient declaration this defendant prays judgment.

W. HALLETT PHILLIPS,
Attorney for D. N. Stanton.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

W. HALLETT PHILLIPS,
Attorney for D. N. Stanton.

STATE OF NEW YORK,
City and County of New York. } *ss.*

I, Daniel N. Stanton, being duly sworn, depose and say that I have read the foregoing demurrer to the declaration in said suit, in which I am one of the defendants, and that said demurrer is not interposed for purposes of delay.

DANIEL N. STANTON.

Subscribed and sworn to before
me, this 31st day of March, 1885.

THOS. ALEXANDER, JR.,
[SEAL.] *Notary Public,*
N. Y. Co.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

The *day of April, A. D. 1885.*

STATE OF ALABAMA

vs.

ISAAC T. BURR ET ALS.

THE defendant, John Demeritt, by his attorney, demurs to the plaintiff's declaration, and says that the said declaration and the matters therein contained in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have its action against this defendant: For that,

First. The plaintiff's remedy, if any exists, is obtainable only in a Court of Equity.

Second. That it is obtainable only in the Courts of the State of Alabama.

Third. That the plaintiff has joined different and distinct causes of action not properly united in the same suit.

Fourth. There is a defect in the persons joined as parties defendant in said suit.

Fifth. That it appears that this Court has no jurisdiction in the premises.

Wherefore for want of a sufficient declaration this defendant prays judgment.

W. HALLETT PHILLIPS,
Attorney for John Demeritt.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

W. HALLETT PHILLIPS,
Attorney for John Demeritt.

I, John Demeritt, being duly sworn, depose and say that I have read the foregoing demurrer to the declaration in said suit, in which I am one of the defendants, and that said demurrer is not interposed for purposes of delay.

JOHN DEMERITT.

Subscribed and sworn to before
me, this 31st day of March, 1885.

AUGUSTUS MERRITT,
[SEAL.] *Notary Public,*
Kings County.

(Cert. filed in N. Y. Co.)

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE STATE OF ALABAMA

v.

ISAAC T. BURR ET ALS.

ORIGINAL NO. 6.

JOINDER IN DEMURRERS.

And the plaintiff saith that the said declaration, and the matters therein contained, in manner and form as the same are stated and set forth, are sufficient in law for the plaintiff to have and maintain her aforesaid action thereof against the defendants. And the plaintiff is ready to verify and prove the same as the Court here shall direct and award: wherefore, inasmuch as the defendants have not answered the said declaration, nor hitherto in any manner denied the same, the plaintiff demands judgment and her damages as before prayed in the said declaration.

THE STATE OF ALABAMA,
by her Attorneys,
H. C. TOMPKINS,
E. S. MANSFIELD.

115-413

Office Supreme Court U. S.
FILED.
APR 1 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1884.

ORIGINAL No. 4

THE STATE OF ALABAMA

v.

ISAAC T. BURR *ET ALS.*

DEMURRER OF SAMUEL A. CARLTON, ONE OF SAID DEFENDANTS.

Supreme Court of the United States.

UNITED STATES. OCTOBER TERM, 1884, No. 6.

THE STATE OF ALABAMA

v.

ISAAC T. BURR *et als.*

ORIGINAL No. 6.

Demurrer of Samuel A. Carlton, one of the defendants named in the above-entitled case, to the plaintiff's declaration in said case.

1. And the said defendant, Samuel A. Carlton, comes and defends the wrong and injury, when, etc., and says that the said declaration and the matters therein contained in manner and form, as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain said action thereof against this defendant; and that this defendant is not bound by law to answer the same. And this he is ready to verify; wherefore, for the insufficiency of the said declaration in this behalf, the said defendant prays judgment.

And the said defendant further shows to the Court here

the following causes of demurrer to the said declaration, that is to say: —

2. For that this Court has no jurisdiction in said case, in that it appears, in and by the exhibits annexed to said declaration, that the consideration and protection which said State of Alabama should have for endorsing the bonds of the Alabama & Chattanooga Railroad Company, and for issuing State bonds in favor of said company, and the remedies which said State should have in any and all like pretended causes of action in said declaration contained, and the form in which the same should be sought and enforced, are matters of express stipulation, competent for and binding upon the plaintiff State, not alleged to be unavailing or exhausted, and are exclusive of the original jurisdiction of this Court in said action in manner and form as the same is brought.

3. For that said declaration contains but one count, wherein are united and mingled many pretended separate and complete causes of action.

4. For that it does not appear in or by said declaration at what time or during what period — absolutely or relatively to any of the acts or things complained of in said declaration — this defendant did, participated in, or knew of any of said acts or things, or occupied any position wherein any misconduct on his part is alleged in said declaration.

5. For that there is no venue or place alleged in and by said declaration at which this defendant is supposed to have done any of the acts or things complained of in said declaration.

6. For that pretended causes of action, different in their natures, are comprehended in said declaration, including fraud and violations of statutory obligations, contracts, and duties on the part of said Alabama & Chattanooga Railroad Company; and the same with deceit, wrongful conversion of property and breach of trust and duty in various

capacities, on the part of certain incorporators, officers, directors, and stockholders, and on the part of the actual managers and controllers of said company; and the appertaining obligations and liabilities of said parties in said capacities and in respect of the acts and things complained of in said declaration appear to be widely different.

7. For that all the pretended causes of action contained in said declaration are founded upon a supposed liability for alleged breach of duty, contract, and obligation, or for fraud on the part of said Alabama & Chattanooga Railroad Company, or for the same or like causes and wrongful conversion, fraudulent representation, or other wrongs on the part of certain incorporators, officers, directors, or stockholders of said company, or on the part of certain actual managers and controllers thereof; and it is not alleged in said declaration that this defendant did any of the acts or things therein complained of, or was in fact an incorporator, or was ever an officer, director, or stockholder in, or an actual manager or controller of, said company; or in respect of his liability in which, if any, of said capacities said action is brought.

8. For that certain other persons, to wit, certain alleged incorporators, officers, directors, stockholders, and actual managers and controllers of said Alabama & Chattanooga Railroad Company are joined as parties defendant with this defendant herein, and no confederation or conspiracy, and no joint contract or tort, or undertaking, act or omission in the nature of either, and no common liability on the part of said defendants or any of them, appears or is alleged in said declaration.

9. For that many of the pretended causes of action in said declaration contained appear to be founded upon an alleged liability of certain stockholders in the Alabama and Chattanooga Railroad Company and of certain directors and other officers and incorporators thereof, under the provisions of

Acts of Alabama, Section 6, Exhibit C, and Section 1, Exhibit E, annexed to said declaration; and it appears, by the true construction of said Acts, that all liability under the same is several and individual, and not joint.

10. For that many of the pretended causes of action in said declaration contained, are founded upon a supposed liability on the part of the said defendants to contribute toward the indemnity of said State for loss alleged to have been sustained from the acts complained of in said declaration, but all the parties supposed to be liable therefor and the supposed share thereof to be borne by this defendant are not alleged, and cannot be ascertained in said action.

11. For that many of said pretended causes of action are founded upon an alleged statutory personal liability on the part of said defendants, as directors or other officers and incorporators and stockholders of said Alabama & Chattanooga Railroad Company, who knowingly violated, or permitted the violation without objection, of any of the provisions under which said railroad company received the endorsement of said State upon its bonds, for any loss thereby incurred, all under and as set forth in an act of said State of Alabama, approved February 11, 1870, a copy whereof is annexed to said declaration, and marked "E;" — and fraudulently obtaining the State's endorsement of said bonds and the sale of said bonds for less than ninety cents on the dollar, and the appropriation of said bonds, or the proceeds thereof, for other purposes than the construction and equipment of said road, are alleged as constituting violations of said provisions; — but it appears, and is not denied, that ~~at the time of the passage of said act~~ said State of Alabama had already endorsed many, if not all, of the bonds which said State ever endorsed for said company, and that the same had been sold; and that all, or a great part of all alleged misappropriations of said bonds, or proceeds thereof, complained of in said declaration, must have already been

made at the time of the passage of said act of Feb. 11, A.D. 1870.

12. For that many of said pretended causes of action are founded upon supposed statutory individual liabilities on the part of certain of said defendants for alleged misconduct as stockholders of said Alabama & Chattanooga Railroad Company, under a general law of said State of Alabama, approved February 19, 1867, a copy whereof is annexed to said declaration, and marked "C." But it appears, *first*, that in and by a subsequent special act of said State, approved November 17, 1868, a copy whereof is annexed to said declaration, and marked "D," that the stockholders in said company were, by the manner of their admission into and lack of control over said company, not within the provisions of said general law; *second*, all stock which appears to have been issued to said defendants is alleged to have been fraudulently issued to them, and afterwards disposed of by them to said company; and no acceptance or time of retention thereof is alleged; *third*, it appears in and by an act of said State of Alabama, annexed by copy thereof to said declaration, and marked "E," that said liability set forth in said act of February 19, 1867, as aforesaid, was modified so that the stockholders aforesaid became liable thereunder only with others, and to the extent only of the loss to said State incurred by violation thereof; and it does not appear that said State incurred or sustained any loss on account of any of the alleged violations aforesaid, and it does appear that said State has voluntarily adjusted and discharged all her liability, the sole cause of all such possible loss, without apparent demand upon, notice to, or consent of, this defendant.

13. For that many of said pretended causes of action appear to be founded upon an alleged liability of certain stockholders of said Alabama & Chattanooga Railroad Company to pay certain of the bonds of said company, endorsed by said State of Alabama, under the provisions of the sixth

section of an Act of Alabama, annexed to said declaration by copy thereof, marked "C;" and it does not appear, and is not alleged, that all said bonds have not been fully paid or cancelled, or that said State of Alabama has ever paid, or is the holder, or could surrender or discharge any of said bonds.

14. For that it appears, in and by said declaration, that said State of Alabama is not properly a party plaintiff in respect of any of the pretended causes of action therein contained; that is to say, it appears that, since the commission of all the acts and things complained of in said declaration, said Alabama & Chattanooga Railroad Company has both been put into the hands of receivers duly appointed by courts of competent jurisdiction over the same; and that said corporation has also been adjudicated a bankrupt in bankruptcy, under the bankrupt laws of the United States, and assignees thereof have been duly appointed in said proceedings, to and in which receivers or assignees all right of recovery for all said pretended causes of action passed and vested.

15. For that many of said pretended causes of action are founded upon alleged fraud and misconduct in obtaining, and for loss resulting from, an alleged excessive endorsement of the bonds of the Alabama & Chattanooga Railroad Company, by said State, and for misappropriation of said bonds, or the proceeds thereof; and for fraud in obtaining and misappropriation of certain of $2,000,000 in bonds and proceeds thereof, alleged to have been issued by said State in favor of said Company. And it appears in and by said declaration, and the exhibits thereto annexed, that the substantial benefit and consideration to be obtained by said State of Alabama for the endorsement of the bonds of the Alabama & Chattanooga Railroad Company, as aforesaid, was the construction, equipment, and completion of said railroad, within said State, and possession by said company of certain railroads, finished, equipped and completed, outside of said State,

and extending in the direction of the *termini* of the railroad of said company within said State; and that such construction, equipment, or possession by said company was for every mile thereof a sufficient warrant, authority and consideration for the endorsement by said State to the extent of $16,000 of said company's bonds; also that the substantial benefit and consideration to be secured to said State for the issuing of said bonds in favor of said Alabama & Chattanooga Railroad Company, to the extent of $2,000,000 aforesaid, was the expenditure of the proceeds of said bonds to expedite the construction and equipment of said company's railroad, in addition to and besides the proceeds of the bonds of said company endorsed by said State, as aforesaid. And it is not alleged, and does not appear, that said Alabama & Chattanooga Railroad Company did not construct, equip and complete, within the State of Alabama, and did not possess outside of said State, and as contemplated in the Acts of said State, set forth by copy in said exhibits, a sufficient number of miles of railroad, equipped and completed, to warrant all the endorsement of its said bonds which said State of Alabama ever made, or that it did not expend in addition to the said bonds or proceeds thereof endorsed by said State, and upon said railroad, a greater sum than the amount or proceeds of said $2,000,000 of bonds alleged to have been issued in favor of said company by said State.

16. For that many of said pretended causes of action are founded upon alleged statutory liability for misappropriation of the bonds or proceeds thereof, of said Alabama & Chattanooga Railroad Company, endorsed by said State, or the bonds or proceeds thereof of said State issued in favor of said company, in that it is alleged that all said bonds and proceeds were not applied to the construction and equipment of said railroad; but it appears, in and by the exhibits annexed to said declaration, that bonds of said company, endorsed by said State on account of certain railroads and

miles thereof possessed by said company out of said State, were not required to be applied as aforesaid; and it is not alleged that there has been any misappropriation of any or if any of what bonds of said company endorsed as aforesaid, in excess of the amount of the endorsement of said bonds to which said company was entitled on account of the railroads and miles thereof possessed by it outside of said State.

17. For that one of said pretended causes of action appears to be a supposed liability on account of fraudulent transfers of or dealings in the stock of said Alabama & Chattanooga Railroad Company, and it appears that said State had no rights or interests in said stock, in that it is provided in the statute of said State, annexed by copy thereof to said declaration, marked "D," that the directors of the Wills Railroad Valley Company should declare the amount of stock in the Alabama & Chattanooga Railroad Company and designate the owners thereof.

18. For that all said pretended causes of action are stale, and barred by lapse of time, in this as well as in other respects, that it appears by the exhibits of statutes, annexed by copy to said declaration, that said State of Alabama provided ample means for early information of any of the pretended causes of action contained in said declaration, and imposed upon certain officers of said State the immediate institution of remedies, other than those herein sought, on account thereof.

19. For that it appears in and by said exhibits annexed to said declaration that said State had ample means for obtaining early information concerning, and for the prevention of, and suitable remedies within its own control for, all the wrongful acts complained of in said declaration; and it appears that said State had such knowledge concerning, and did not avail itself of its remedies for nor prevent any of said alleged wrongful acts.

20. For that said State of Alabama is precluded from

maintaining any action against this defendant founded upon or growing out of any unauthorized endorsement by said State of said bonds of said Alabama & Chattanooga Railroad Company, in that it appears in and by the endorsement of said bonds by said State that the Alabama & Chattanooga Railroad Company had complied with all the conditions upon compliance with which said bonds were to be endorsed.

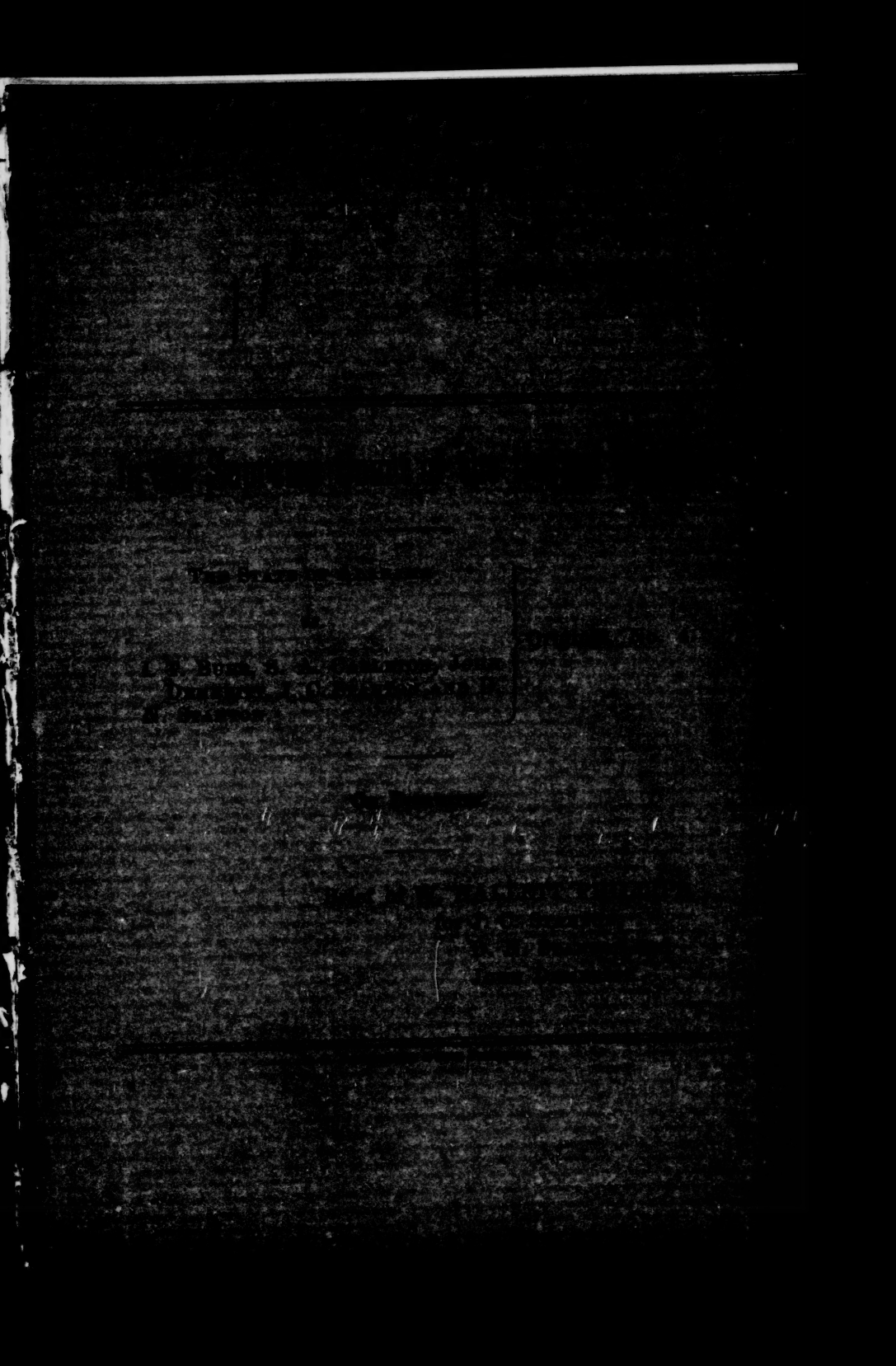
And for that said declaration is, in other respects, uncertain, informal, and insufficient.

Samuel A Carlton
By his attorney
John Leeombe

I certify that, in my opinion, the foregoing demurrer is well founded in law.

John Leeombe.

Counsel.



IN THE

Supreme Court of the United States.

THE STATE OF ALABAMA *vs.* I. T. BURR, S. A. CARLETON, JOHN DEMERITT, J. C. STANTON, D. N. STANTON.	Original, No. —.

Brief of W. Hallett Phillips for defendants, J. C. and D. N. Stanton, and John Demeritt, on demurrer.

This is an original action at law in this Court, brought in the name of the State of Alabama against the defendants, alleged to be citizens of New York, New Jersey and Massachusetts.

It purports to be founded on certain statutes of Alabama, granting aid to the Alabama and Chattanooga Railroad Company, a corporation organized under the laws of Alabama, and running through the States of Alabama, Tennessee, Georgia, and Mississippi.

The declaration opens with a statement of the organization of the company.

This shows that the Wills Valley Railroad Company, and the Northeast and Southwest Alabama Railroad Company, both corporations organized under the laws of Alabama, were authorized by an act of that State, passed October 6, 1868, to consolidate and adopt the name of the Alabama and Chatanooga Railroad Company, and it was provided that thereupon such consolidated company should have the benefit of the State's endorsement of its bonds, provided for by the act of September 22, 1868.

By the latter act it was enacted, that whenever any railroad company incorporated by the State of Alabama, should have finished, equipped and completed twenty miles of road at or near either or both ends of the road, the Governor should endorse in the name of the State, the first mortgage bonds of the company to the extent of $16,000 per mile for that portion so completed, and the same rate of endorsement for each subsequent section of five miles, until the whole road was completed.

It also authorized a like endorsement of the bonds of any railroad company chartered by the State and extending beyond the limits of the State, which should have twenty miles of road completed outside of the State, provided, that no bonds endorsed under the provisions of this act should be sold for less than ninety cents on the dollar, and that the provision relating to the extension should only apply to the Wills Valley Railroad Company.

By the act of November 17, 1868, the latter corporation was authorized to purchase the Northeast and Southwest Railroad, under a certain mortgage made to the State, and was further empowered to rescind any agreement for consolidation which might have existed between the two companies. The act also provided, that the Wills Valley Company, after the purchase, might change its name to the Alabama and Chatanooga Railroad Company.

By section 7, it was enacted, that whenever it appeared to the Governor, by satisfactory proof, that at least twenty miles of the Northeast and Southwest Alabama Railroad, commencing at Meridian in Mississippi, was finished, equipped and completed, he should endorse the first mortgage bonds of the corporation then owning the franchise of the Northeast and Southwest Railroad, to the extent of $16,000 per mile for that portion thus finished, equipped and completed, and the like rate of endorsement for each subsequent section of five miles; provided, that the railroad should first guarantee to the satisfaction of such Governor, the completion and equipment of the road within a reasonable time to be prescribed by him, and should further guarantee that the road was first class, and that the bonds should not be sold for less then ninety cents on the dollar, and that they should constitute a lien first upon the whole road, and provided further:

> "That the general laws on the subject of endorsement of the bonds herein authorized, except in so far as the same may be modified or changed."

These general laws are, the Act of September 22, 1868, already mentioned, and which is entitled "an act to amend the law to establish a system of internal improvements in the State of Alabama," and the General Internal Improvements Act of February 19, 1867.

The latter act provided for the endorsement, by the Governor, of the first mortgaged bonds of railroads to the extent of twelve thousand dollars per mile, such bonds to have priority in favor of the State over all liens whatever. By section 5, it was enacted, that the bonds specified should not be used by the company for any other purpose than the construction and equipment of the road; and that the Governor should not endorse the same unless on the affidavit of the President of the Company, and a resolution of the majority of the directory, that such bonds should not be used for any other purpose, nor sold for less than ninety cents on the dollar.

Section 6 provides, that it shall be the duty of the Governor, when informed that any company had fraudulently obtained the endorsement of its bonds, or had obtained the endorsement contrary to the act, or sold or disposed of the bonds for less than ninety cents on the dollar, to notify the Attorney-General, whose duty it should be forthwith to institute a suit against the company in the name of the State, in the Circuit or Chancery Court of the county of the place of business of the company, setting forth the facts; and the court, if the facts were found to be true, should order a sale of the road

lying within the State, or a sufficiency thereof, and the proceeds thereof should be paid into the treasury for the purpose of forming a sinking fund, as provided by the eleventh section of the act, and the company should forfeit all rights and privileges under the provisions of this act.

> "And the stockholders thereof shall be individually liable for the payment of the bonds, the endorsement of which was so fraudulently obtained by such company, or which were sold or disposed of for less than ninety cents on the dollar, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of, or opposed, the perpetration of such fraud by the company."

By the Act of February 11, 1870, the Governor was authorized, for the purpose of expediting the construction of the Alabama and Chattanooga Railroad, to issue the bonds of the State in favor of the company to the extent of two millions of dollars, provided that such bonds should issue only in such sums as should be shown by sufficient evidence to the Governor, to have been expended by the company in the construction and equipment of its road, in addition to and besides the proceeds of the bonds endorsed by the State, which the said railroad company should have received under the laws of the State then in force.

To secure the same, the company was required to give the State, in exchange, its first mortgage bonds secured by a first mortgage upon the lands granted by the United States, on the telegraph line, machine shops and other property, in Alabama, Georgia, Tennessee, and Mississippi; also on all coal mines and mineral lands and iron manufacturing establishments owned by the company.

> "*Provided further*, that the directors or other officers and incorporators and stockholders of said railroad company, who shall knowingly violate, or permit the violation without objection, of any provision of this act, or of the act under which the company is now receiving the endorsement of the State, shall be held personally liable to the State for any loss incurred thereby.

The above are substantially all the provisions of the legislation of Alabama relied on by the State to sustain the present action, which grows out of alleged violations by the company of such legislation to the damage of the State, participated in by the defendants, who are alleged to have been at the time of such wrong doings, the majority and controlling incorporators, officers, directors and stockholders of the company.

The "wrongs, injuries and losses" to the plaintiff, complained of, are stated as follows:

That the Alabama and Chatanooga Railroad Company issued first mortgage bonds in excess of

the number which it was authorized by law to issue, and have endorsed, and secured from the Governor the endorsement by the State of the same; that this was affected by various misrepresentations made by the company to the Governor. These bonds were issued January 1, 1869.

That all of the bonds were sold by the company to persons who purchased them without notice of any fraud or illegality.

That the company, to secure its first mortgage bonds, gave a mortgage December 19, 1868, to Adams, Dane and Demeritt, trustees. Subsequently these trustees resigned, and F. B. Loomis, J. C. Stanton and D. N. Stanton were appointed trustees in their places.

That on September 15, 1871, a petition in bankruptcy was filed in the United States District Court, Middle District of Alabama, against the company, and it was declared bankrupt, and assignees appointed, who, on April 22, 1872, by order of the court, sold the railroad, and it was purchased by the State, subject to the lien of the first mortgage, for its protection as endorser.

That in 1874, on a bill filed by the trustees, the first mortgage was foreclosed in the United States Circuit Court for the Southern District of Alabama, and in 1877, the road was sold under decree of that court, and a conveyance made to the purchasers.

(*Wallace* vs. *Loomis*, 97 U. S., 159.)

The declaration further alleges that the State, in its endorsement of the bonds of the company, and in

the issue of its own bonds to the company, relied on the truthfulness of the false statements made by the company, as well as on the provisions of the acts relating to the liability of the directors, officers, incorporators and stockholders of said corporation, knowingly violating such acts.

It then proceeds to state that "on or about" different dates, in the year 1869, certain specified sums of money accruing from the sales by the corporation of the endorsed bonds, were unlawfully, and fraudulently appropriated by the company to the use of the defendants and were not used for the benefit of the corporation, nor for the purpose of constructing or equipping its road; also, that during the years 1869 and 1870, the company, with the knowledge of the defendants, sold a large number of bonds for less than ninety cents on the dollar.

That during the same years the company, with the permission of the defendants, allowed a large amount of the endorsed bonds, and the proceeds of such, to be unlawfully paid and given to various persons, and that neither such bonds nor their proceeds were applied for the benefit of the road or for its construction or equipment.

That the company, from the time it procured the endorsement of its bonds, kept its books out of the State, and concealed from plaintiff all knowledge touching the wrongful acts of said company and the defendants, which plaintiff only acquired notice of within twelve months last past.

That by the wrongful acts of the company, permitted and participated in by the defendants, the company became a bankrupt, and was rendered unable to pay the interest on the endorsed bonds, which the State was compelled to pay; and that by reason of such acts the State had been further damnified to the extent of one million of dollars in settling her liabilities created by her endorsement.

The declaration concludes, that by force of the State statutes, an action had accrued to the plaintiff to recover against the defendants, compensation and damages to plaintiff sustained as aforesaid, which are stated to be three million of dollars.

To this declaration, demurrers have been filed by the defendants, and the first question for consideration is whether the action is sustainable.

There appear to be four grounds of complaint:

1. That by the fraudulent representations of the company, the Governor of the State was induced to endorse a larger number of the bonds of the Alabama and Chatanooga railroad than ought to have been endorsed.

2. That the company, with the knowledge of the defendants, officers and stockholders, permitted endorsed bonds, and the money derived from the sales of such bonds to be improperly diverted, and used and appropriated for other purposes than the building and equipment of the road.

3. That the company, with the knowledge and acquiescence of the defendants, sold some of such bonds for less than ninety cents on the dollar.

4. That by the illegal action of the company, participated in by the defendants, it was rendered bankrupt, whereby the State was compelled to pay the interest accruing on the endorsed bonds.

It is claimed that by reason of the acts complained of, loss and damage has accrued to the State (the only party plaintiff), and that by virtue of the State statutory enactments, to which we have referred, such damage is recoverable against the defendants in this action.

The soundness of this contention depends upon the construction which the Court shall give to those sections of the statutes which are alleged to impose a personal liability.

The bonds were endorsed under the acts of Sept. 22, 1868 and Nov. 17, 1868.

The first act does not contain any provision bearing on the liability sought to be enforced in this action. Reliance is placed on the proviso, in the latter act, "that the general laws on the subject of the endorsement of the bonds herein authorized, except in so far as the same may be modified or changed."

It is claimed that the words, "shall remain in force," should be supplied, and that by this is meant

that the general law of 1867, establishing a system of internal improvements, is referred to, and continued in force, and especially sections 5 and 6 of that act.

Section 5 enacts, that "the bonds, before specified," shall not be used by the company for any other purpose than the construction and equipment of the road.

Section 6, to which we have already referred, first provides for a proceeding to be instituted by the Attorney General of the State in the State court at the instance of the Governor and in the name of the State, whenever he is notified that any railroad company had fraudulently obtained the en dorsement of its bonds, or had sold the bonds for less than ninety cents on the dollar.

He is directed to institute a suit against the company in *the Circuit or Chancery Court of the county of the place of business of the company*, setting forth the facts, and if such facts are proven to the satisfaction of the court, it may sell the road lying in the State, the proceeds of sale to be invested in State bonds or bonds endorsed by the Governor, thereby creating a sinking fund for the payment of the bonds; "and the stockholders thereof shall be individually liable for the payment of the bonds, the endorsement of which was so fraudulently obtained, or which were sold or disposed of for less than ninety cents on the dollar, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by

such company, *excepting such stockholders as may show to the said court*, that they were ignorant of or opposed to the perpretation of such fraud by the company."

The reading of this section suggests whether any liability is enforceable against the stockholders, except in the suit against the company.

This section, and in fact the entire act, is copied from the Internal Improvement Act of Tennessee, of 1852, discussed by this Court in Tennessee Bond Cases, 114 U. S., 702.

Speaking of section 13 of that act, the language of which is identical with that of section 6, of the Alabama Act of 1867, this court said, "the evident purpose of this section was to give the State the power, immediately on the discovery of a fraud, to demand of the company payment of the bonds; that is, payment of an amount of money equal to that called for by the bonds, and a remedy at once against the company and its implicated stockholders, for the enforcement of such a payment, in case it was not voluntarily made. The money when collected was to be set apart and invested 'as a sinking fund for the payment of the bonds' by the State."

The remedy given to the State of Alabama has not been pursued. On the face of the declaration it is shown that the Alabama and Chattanooga Railroad Company is no longer in existence, having been

sold out under foreclosure of the first mortgage which was given to secure the endorsed bonds.

A material question for the consideration of the Court is, whether an action is maintainable against the defendants on account of the alleged illegal endorsement by the Governor, without any allegation in the declaration that the defendants were parties to the transaction, or cognizant thereof?

The gist of the liability consists in the fraud practiced by the company and participated in by the defendants. The declaration alleges that the State, in endorsing the bonds of the company, and in issuing its own bonds, relied upon the provisions of the acts "for any loss that should be incurred by the plaintiff by reason of the directors, officers, incorporators and stockholders, *knowingly* violating any provision of the acts."

The declaration fails to allege any such knowledge of fraud on the part of the defendants as to the alleged illegal endorsement, and for this reason, we submit, shows no cause of action as against such defendants. In the language of Lord Mansfield: "The plaintiff must aver a case which brings the defendant within the statute:"

Spieres vs. *Parker*, 1 Term., R. 141.

The act of 1867, says that the stockholders shall be liable for the payment of the bonds fraudulently endorsed, "excepting such stockholders as may

show to the said Court that they were ignorant of or opposed the perpetration of such fraud by the company."

The defendants cannot be proceeded against for such fraud without alleging that they had knowledge of the fraud or were parties to it. The exception in the clause must be negatived.

The rule is thus stated by Lord Tenterden:

> "If an act of Parliament or a private instrument contains in it first a general clause and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception, and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance."
>
> *Vavasour* vs. *Ormond*, 6 Barn. and Cress., 432.

The reason of the rule is that, unless the exception is negatived on pleading the clause, no cause of action appears in the declaration. The case provided for is not made out.

Commonwealth vs. *Hart*, 1 Bennett and Heard, Lead. Crim. Cases, 255.

The act of 1870, which in this connection is also relied on, provides, that the officers and stockholders "who shall knowingly violate any provision of the act under which said company is receiving the endorsement of the State on its bonds, shall be personally liable to the State for any loss incurred thereby."

While this act cannot retrospectively impose liability not imposed by the acts under which the bonds were issued, yet it and the provision of the act of 1867 must receive the same construction. The liability is the same under both acts, and the allegations in a declaration to enforce such liability under either act, must be based on the same grounds.

The act of 1867 not only prescribes the liability and the remedy of the State, but names the forum in which that remedy must be enforced. The Governor is to institute suit against the company on account of the fraud, in the Circuit or Chancery Court of the county in which the company has its place of business of the company, and the stockholders are made liable, "excepting such stockholders as may show to the SAID COURT" that they were ignorant of the fraud.

Inasmuch as the present action is entirely statutory, the State can only obtain relief in the mode and in the forum pointed out by the statute. In bringing the suit in this court, the State has mistaken her remedy.

If the act of 1868, under which the bonds were issued, as contended by the plaintiff, continued in force this section of the act of 1867, as regards

the liability of stockholders, it continued also in force the provision as to the forum in which that liability was to be enforced.

The second ground of complaint is based on the alleged misappropriation by the company, with the knowledge and participation of the defendants, of a part of the endorsed bonds and the proceeds arising from the sale of endorsed bonds.

Would such misappropriation constitute, in the language of the statutes, a loss to the *State*?

The decision of this question will dispose of a large portion of the declaration.

Undoubtedly, a fraudulent diversion of the funds of the corporation by its officers or stockholders, makes a plain case of loss to the corporation, and it, as an entity, or its innocent stockholders, could sue to recover back such funds.

It cannot be that the State could also sue for the same cause of action, for that would be to enforce a double liability.

Undoubtedly, the object of the State's endorsement was to enable the company to raise the means whereby to construct the road.

There is no allegation that this object was not attained. The road was built and completely equipped.

After the bonds were delivered to the company and sold for the purpose specified, it is alleged that

portions of the *proceeds* of the *sales* were used in an illegal way.

If this were granted it is difficult to see what loss thereby ensued to the State, any more than would have ensued if funds of the company derived from sources other than the proceeds of sales of endorsed bonds, had been misappropriated.

When once the bonds were endorsed and sold by the company the State became liable as endorser, and the disposition of the proceeds of sale could not effect that liability.

The State secured itself by the amplest provisions, as we will hereafter show, against the inability of the company to meet its obligations as the maker of the bonds.

In respect to the point, we are now considering, the case is like that of *Union Pacific Railroad Company* vs. *United States*, 98 U. S., 569.

The United States in order to enable the Union Pacific Company to construct its road, issued to it a large amount of bonds, which the company secured, and, besides, made to it an enormous grant of lands.

Congress having been informed that certain persons connected with the road as officers and stockholders, had combined together and fraudulently and illegally obtained possession of a large portion of the bonds and lands, which had been granted, passed the act of March 3, 1873. (17 Stat., 569.)

That directed the Attorney General to institute a suit in equity against the company and all persons who may have received stock or other property of

said road unlawfully, or who may have received as profits for construction, moneys or other property which ought to belong to the company; "or who may under, pretense of having complied with the acts, to which this is an addition, have wrongfully and unlawfully received from the United States bonds, moneys or lands which ought in equity to be accounted for or paid to said company or to the United States," to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property or its value, either to said railroad corporation or to the United States.

A suit in equity was accordingly instituted under the act in the name of the United States, the company being made a party.

This Court on appeal sustained the demurrer to the bill. As to the relief sought, it was held that the United States was not the party to complain, but that the damage was to the company to which alone relief could be given. The company, although a party sought, no relief. That the United States could not *in invitum*, obtain relief either for the company or for the innocent stockholders, who were really the parties injured, but who did not complain. As to the contract relation of the United States to the company and the stockholders, the Court said, that the United States was a creditor; it had loaned its bonds to the company, and granted on certain terms a quantity of land.

> "The government is paying all the time interest on its own bonds, loaned to the company.

The company is bound to pay them promptly and interest at their maturity. The government, by contract, has a lien upon the road to secure this payment. * * * The government has delivered its bonds to the company. The company has built the road, owns it and operates it. Does the bill allege anything which, growing out of this contract, entitles the United States to relief?" * * * *

"It is said that the latter as a creditor, whose lien is endangered by the extravagance of the company and the misappropriation of its means, has the right to come into equity, for preventive relief, to secure the collection of the sums of which the company has been defrauded."

"The government made its contract and bargained for its security. * * * It is difficult to see any right which, as a creditor, the government has to interfere between the corporation andthose with whom it deals. It has been careful to protect its interests in making the contract, and it has the right which that con tract gives. What more can it ask?" * * *

"We are unable to see any relief to which, under this bill, the United States, under its contract relations with the company, would be entitled in a court of equity."

"If we look to the statute this is still clearer. Those who may have wrongfully and unlawfully received from the United States, bonds, moneys, or lands, which ought in equity to be accounted for, and paid to it or to the company, may be compelled to pay the moneys, or restore the property to the party, which shall in equity be entitled thereto."

> "But in this connection no one but the company has received property, lands or moneys from the United States. There is no allegation that the moneys were not used to build the road. If there was, there is nothing now due, and the company is performing all its obligations to the Government under the contract." 98 U. S., 614–618.

The court also held that the bill could not be sustained in virtue of any sovereign powers possessed by the Government as trustee or otherwise. *People* vs. *Ingersoll*, 58 N. Y., 1, is cited with approbation. In that case the Court said:

> "If the property of a corporation be illegally interfered with by corporation officers and agents, the remedy is by action at the suit of the corporation, and not of the Attorney-General."

The resemblance of the present suit to the Union Pacific case is too close to need comparison.

As endorser of the bonds of the Alabama and Chatanooga Railroad Company, the State of Alabama stood in the like position to that company, as that occupied by the United States, to the Union Pacific Company.

In regard to the latter Company, the United States sustained close relations, it being a great national agency. In addition, the company was a party to the litigation, and the suit had been specifically directed to be brought by Congress.

None of the reasons for sustaining that suit, hold in the present case.

It will be noticed that no facts are stated in the declaration showing the alleged misappropriations of the proceeds of sales of bonds.

It is attempted to anticipate this objection, by alleging that the books of the company had been kept out of the State, and that the acts complained of had been concealed.

These excuses might lay the foundation for a bill of discovery against the defendants, but, we submit, cannot extenuate the defective statements of the declaration.

The third ground of complaint rests on the allegation that many of the endorsed bonds were sold for less than ninety cents on the dollar, in contravention of law.

Reliance is placed upon the act of 1868, which say that the bonds should not be sold for less than ninety cents on the dollar, and upon Section 6 of the act of 1867, which provides that the fact of such sale should be cause for proceeding against the road in the Chancery or Circuit Court of the place of business of the company, and which makes all stockholders, except those who should show *to that court* that they were ignorant of the sales, "liable for the payment of the bonds."

We do not understand that the present proceeding is one to make the defendants liable for "the payment of the bonds." If it were it could only be brought in the court specified by the act of 1867, and by the proceeding against the company and its stockholders therein prescribed.

While the act of 1868 forbids the sale of the bonds at less than ninety cents, it provides no penalty.

The State is amply protected by that provision of Sec. 7 of the act of Nov. 17, 1868, which provides that before the Governor endorses the bonds, he shall first obtain a guarantee from the railroad that no bonds shall be sold for less than ninety cents on the dollar. In addition, as we have seen, a sale below that amount is made ground for a proceeding to sell the road.

It is only under the act of 1867 that any liability can be set up. It is difficult to see how the fact of the company selling bonds at less than 90 cents on the dollar, constituted a "loss to the State," for which the State could sue and recover damages.

We submit that, under the act of 1867, it can not be successfully maintained, that where the company has received the full proceeds of bonds disposed of at a price somewhat less than the minimum named by the statute, the stockholders, can still be made liable, in the nature of a penalty, for the face value of the bonds.

The last ground of liability is, that by reason of the illegal and fraudulent acts of the company, per-

mitted and participated in by the defendants, the corporation became a bankrupt, and was rendered unable to pay the interest on the endorsed bonds, which the State was therefore obliged to pay; and by reason of such acts the State was further damaged to the extent of a million of dollars in settling her liability, evidenced by the endorsement of the bonds of the company.

The position occupied by the State is, that by the terms of the endorsement the State became liable for the payment of the principal and interest of the bonds.

The question is, whether the State, as endorser of the bonds of the railroad, can maintain an action against the stockholders on the ground that, by the illegal acts and fraud of the company, participated in by the stockholders, the company was rendered bankrupt and unable to meet the interest on its bonds which therefore had to be paid by the State?

If any cause of action under this head is stated, it can only arise under the Act of 1867.

As previously remarked, the remedy there given must be pursued, and there is no justification for the present action.

As a general principle, if could hardly be contended that an action would lie by the surety on the ground suggested.

In the present instance, the State, by the amplest provisions of law, has protected itself against loss growing out of the endorsement of the bonds of the company, and especially against the inability or failure of the company from whatever cause, to meet the interest accruing on it bonds.

By Section 4, of the Act of 1867, it is provided that the endorsed "first mortgage, and bonds issued thereon, shall have priority in favor of the State."

By Section 6, as we have seen, elaborate provision is made in case of any violation of the act, for the seizure and sale of the road by the State, in the manner and form therein prescribed.

Section 7 provides, that as soon as the Governor on behalf of the State shall have endorsed the bonds of any company for each section of road completed, said endorsement shall constitute a lien upon such section, and the State shall be invested with said lien or mortgage without a deed from the company, for the payment by said company of the bonds, with interest thereon as the same becomes due ; and when the road is completed, the State shall be invested with a lien upon the entire road and all the property owned by the company ; and after the endorsement for the first section, it forbids the company from creating any lien having priority over that of the State.

Section 8 enacts that it shall be the duty of the company to deposit with the Comptroller of the State, before the interest becomes due, an amount sufficient to pay such interest. If the company fails

to make such deposit, the Governor is empowered to take possession of the road, manage the same and appoint receivers, and to pay over the rents, issues and profits toward the liquidation of unpaid interest.

Section 9 makes provision for securing the State in case the company fails to pay its bonds when they fall due. If the company should fail to deliver up the road, the Governor is authorized to issue his warrants to the sheriff of the counties through which the road runs commanding them to take possession and place a receiver in possession, the receiver to retain such possession until sufficient amount is realized to secure the payment of the bonds with the interest thereof.

Section 10 provides that the road may be bought in by the State in case of its sale under the act.

Section 11 provides for a sinking fund for the payment of the endorsed bonds.

Section 12 provides for semi-annual reports to the Governor until the completion of the road, which shall set forth the financial condition of the company, its receipts and expenditures, &c.

Section 15 provides that the State reserves the right to enact all such laws as may be deemed necessary to protect the interests of the State and to secure the State against any loss in consequence of the endorsement of the bonds, but in such manner as not to impair the rights of the stockholders of the company.

Section 20 provides in all cases where bonds are endorsed by the Governor, the State shall be entitled to two directors.

By the act of November 17, 1868, as we have shown, the Wills Valley Company was authorized to purchase the Northeast and Southwest Alabama Railroad, and to change its name to the Alabama and Chatanooga Railroad. By section 7 the first mortgage bonds of the latter road are authorized to be endorsed by the Governor to the same extent as in the act last cited and on the same guarantees.

It is thus perceived that the State, by its contract with the company regarding its endorsement of the company's bonds, supposed that it had amply protected itself against any loss growing out of the failure of the company to meet the interest or pay the principal of the endorsed bonds.

It seems that this expectation on the part of the State has been disappointed, and it now seeks to throw the contract aside and to obtain reparation from those with whom it never contracted.

It was by reason of the non-payment of interest, that the first mortgage was foreclosed at the instance of holders of the first-mortgage bonds, and the road sold by the court to pay those bonds.

The present action has been brought some seventeen years after the occurrence of the transactions out of which the suit arises.

The company, whose bonds were endorsed, and who is charged with fraud, no longer exists.

While it is true the declaration alleges that the matters complained of were concealed by the com-

pany with the concurrence of the defendants, yet under the statutes of Alabama the State possessed the fullest powers of investigation and control over the affairs of the company.

While it is alleged that a large portion of the endorsed bonds were not used for the purposes of the road, we have the fact that, under the act of 1870, two million dollars of State bonds were issued to the company, under a proviso of that act, to the effect that the bonds should be issued only in such sums as "shall be shown by sufficient evidence to the Governor of the State to have been expended by the said Alabama and Chattanooga Railroad Company, in the construction and equipment of its said railroad, in *addition to and besides the proceeds of the bonds endorsed by the State*, which the said railroad company shall have received under the laws of the said State now in force."

In the above brief we have dwelt on what we conceive to be fundamental defects in the declaration.

Other questions of law, and particularly that the jurisdiction, if any, is in equity and not at law, will be presented in the briefs of other counsel for defendants.

We ask for judgment on the demurrer in favor of the defendants.

W. HALLETT PHILLIPS,

For J. C. Stanton, D. N. Stanton and John Demeritt, Defendants.

115-413

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SUPREME COURT OF THE UNITED STATES.

NO. 4 ORIGINAL.

OCTOBER TERM, 1885.

THE STATE OF ALABAMA

v.

ISAAC T. BURR ET ALS.

BRIEF FOR PLAINTIFF

ON ARGUMENT OF DEFENDANTS' DEMURRERS TO DECLARATION.

H. C. TOMPKINS,
SAM'L F. RICE,
E. S. MANSFIELD,
for Plaintiff.

Supreme Court of the United States.

NO. 4 ORIGINAL.

OCTOBER TERM, 1885.

THE STATE OF ALABAMA *v.* ISAAC T. BURR ET ALS.

BRIEF FOR PLAINTIFF

ON ARGUMENT OF DEFENDANTS' DEMURRERS TO DECLARATION.

STATEMENT OF THE CASE.

The declaration avers in substance as follows: —

1. That there is a controversy of a civil nature between the plaintiff, the State of Alabama, and all of the defendants, citizens of the States of Massachusetts, New York and New Jersey, respectively, as therein set forth.

2. That by an act of the general assembly of the State of Alabama, entitled "An act to authorize the consolidation of the Northeast and Southwest Alabama Railroad Company with the Wills Valley Railroad Company, and to provide for the organization of the corporation formed by such consolidation, and to give it the benefit of the state's endorsement of its bonds, and to regulate the said consolidation," approved October 6, 1868, "Exhibit A," annexed to the declaration, it was enacted that the Wills Valley Railroad Company and the Northeast and Southwest Alabama Railroad Company, two Alabama corporations then existing, should be empowered to consolidate under the name of the Alabama and Chattanooga Railroad Company, and upon such consolidation the Alabama and Chattanooga Railroad Company should be entitled

to the benefit of an act of the general assembly of Alabama, entitled "An act to amend the law to establish a system of internal improvements in the State of Alabama, approved September 22, 1868," now in force, so far as it relates to any matter involved in this suit, "Exhibit B," annexed to the declaration, by which it was, among other things, enacted that whenever any railroad company, then or thereafter incorporated by the State of Alabama, should have completed twenty continuous miles of road at or near either or both ends of the road, the governor of that state should endorse, in behalf of the state, the first-mortgage bonds of the company to the extent of $16,000 a mile for the portion of the road thus completed, and such rate of endorsement should continue upon the same conditions for each subsequent section of five miles until the railroad should be completed, *provided* that no bonds so endorsed should be sold for less than ninety cents on the dollar; that a notification to the governor by any corporation engaged in the construction of a road within the provisions of that act, that it would construct the road with a view to obtain the endorsement of bonds under that act, and the actual *bona fide* completion of twenty continuous miles of the same, should amount to a contract upon the part of the corporation, that it would, within a reasonable time, finish, equip and complete the same, and upon the part of the state, that the state would endorse the bonds of such corporation upon the conditions and in the manner prescribed in that act.

3. That by an act of the general assembly of Alabama, entitled "An act to establish a system of internal improvements in the State of Alabama," approved February 19, 1867, now in force, so far as it relates to any matter involved in this suit, "Exhibit C," annexed to the declaration, it was, among other things, enacted that the stockholders of any railroad company then or thereafter incorporated should be individually liable for the payment of the bonds the endorsement of which by the state was fraudulently obtained by such company, or which should be sold or disposed of for less than ninety cents on the dollar, and for all other losses that might fall upon the state in consequence of any other fraudulent act by such company.

4. That by the said act approved September 22, 1868, it was also enacted that whenever any railroad of an Alabama corporation extended beyond the limits of Alabama, and should have twenty continuous miles of its road completed outside of the state, and should guarantee, to the satisfaction of the governor of Alabama, its completion to its terminus within the state in a reasonable time to be prescribed by him, the governor should endorse, on behalf of the state, the first-mortgage bonds of such railroad company to the extent of $16,000 a mile for each completed twenty continuous miles, and this rate of endorsement should continue for each subsequent section of five completed miles until the railroad should be completed, *provided* that no bonds endorsed thereunder should be sold for less than ninety cents on the dollar.

5. That by an act of the general assembly of Alabama, entitled "An act relating to the Wills Valley Railroad Company and the Northeast and Southwest Alabama Railroad Company," approved November 17, 1868, "Exhibit D," annexed to the declaration, the former was authorized to purchase, under a certain mortgage by the latter to the State of Alabama, all its railroad property and franchise, and after acquiring the same, to change its name to that of the Alabama and Chattanooga Railroad Company, provided that the general laws of Alabama on the subject of the endorsement of the bonds therein authorized should be applicable to such corporation; that the number of directors of said Alabama and Chattanooga Railroad Company, when that name should be taken as aforesaid, should be fixed by the directors of the Wills Valley Railroad Company at not less than seven; that the number should afterwards be prescribed by the directors of the Alabama and Chattanooga Railroad Company, and that there should be no restriction as to their residence, or as to the residence of the number necessary to constitute a quorum, or as to the location of the office or principal place of business.

6. That under the acts of October 6, 1868, and November 17, 1868, the Wills Valley Railroad Company duly acquired the property and franchise of the Northeast and Southwest Alabama Railroad Company, and duly changed its name to the Alabama and Chattanooga Railroad Company, which became a duly existing corporation December 19, 1868.

7. That the defendants were December 19, 1868, and from thence continuously up to and after the time of the occurrence of the wrongs and injuries and losses to the state thereinafter stated, the majority and controlling incorporators, officers, directors and stockholders, as well as the actual managers and controllers, of the Alabama and Chattanooga Railroad Company; but the state has no means of ascertaining, and cannot state, what amount of capital stock of that corporation was ever declared, or was ever issued to, or was or is held or owned by the defendants, or either of them, except as thereinafter set forth.

8. That the railroad of the Alabama and Chattanooga Railroad Company, and under its management from December, 1868, until after May, 1871, was designed and authorized to extend beyond the limits of Alabama, and from Meridian, Miss., through Alabama and Georgia, to Chattanooga, Tenn., a distance of 295 miles, and its length, when completed, is 295 miles.

9. That the Alabama and Chattanooga Railroad Company, under said acts of Alabama, in or about December, 1868, duly notified the governor of that state that it would construct the railroad it was then building under the provisions of said acts for the purpose of obtaining from the state her endorsement of its bonds under the provisions of said acts, and the company issued not only its bonds which it was authorized by said acts to issue and to procure to be endorsed thereunder, but also a large number of its bonds in excess of that number, to wit, 1250 of its bonds. Each of said bonds was dated January 1, 1869, for $1000, payable to the plaintiff or bearer at the National Security Bank of Boston, Mass., January 1, 1889, with interest coupons attached, payable semi-annually each year after January 1, 1869, at the rate of 8 per cent a year.

10. That the company issued these bonds with the fraudulent intent to procure the endorsement of each thereof by the governor, as if the endorsement of each thereof by him was authorized by said acts, with intent to deceive the governor, and to defraud the state to the extent of an amount equal to so many of the bonds and endorsements thereof as were not authorized by said acts to be endorsed by the governor, and did, by falsely and fraudulently presenting to the governor for endorse-

ment by him more of its bonds than said acts authorized him to endorse, wrongfully procure his endorsement of each of said bonds and their redelivery to the company, falsely representing to him that at the time of the application and procurement of said endorsements the company had twenty continuous miles of its railroad finished, equipped and completed, outside of Alabama and in Mississippi, and extending in a northeasterly direction towards Alabama, and that it had twenty continuous miles of its railroad finished, equipped and completed, from Chattanooga, Tenn., in a southwesterly direction towards Alabama, but outside of Alabama.

The declaration sets forth a copy of the endorsement whereby the state became liable for the payment of the principal and interest of each of said bonds.

11. That the company, December 19, 1868, mortgaged its railroad and property to secure the payment of said bonds.

12. That by an act of the general assembly of Alabama, entitled "An act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of such company within the State of Alabama," approved February 11, 1870, now in force, so far as it relates to any matter involved in this suit, "Exhibit E," annexed to the declaration, the governor was required, on the application of the company, to issue the bonds of the state to an amount not exceeding $2,000,000, in favor of the company, bearing interest at a rate not exceeding 8 per cent a year, payable semi-annually, the principal payable at the expiration of not less than fifteen nor more than thirty years. That act contains certain provisions, among others the following: "*Provided further*, that the directors or other officers and incorporators and stockholders of said corporation who should knowingly violate, or permit the violation of, without objection, any provision of that act, or of the act under which said corporation was then receiving the endorsement of the state upon its bonds, of sixteen thousand dollars per mile, shall be personally liable to the state for any loss incurred thereby;" "*provided*, that the bonds issued by virtue of this act shall not be sold for a less sum than ninety cents on the dollar;" "*provided*, that no money accruing from the sales of the bonds specified in this act, or bonds endorsed by the state for

said railroad company, shall be applied in the construction or equipment of any railroad outside of this state, or for other purposes."

13. That after a pretended compliance by the company of the act of February 11, 1870, 2000 of the bonds of the state were issued and delivered to the company, each for $1000, dated March 1, 1870, payable March 1, 1890, with interest-bearing coupons attached, payable semi-annually after March 1, 1870, at the rate of 8 per cent a year.

14. That upon involuntary proceedings in bankruptcy in the District Court of the United States for the Middle District of Alabama against the company, it was declared bankrupt November 6, 1871, and April 22, 1872, by order of that Court, the assignees sold the company's railroad and property, and the state purchased the same, subject to the lien of the said mortgage securing the payment of said endorsed bonds, for the purpose of protecting her interest as such endorser and saving herself from greater loss.

15. That in May, 1872, suit was commenced in the Circuit Court of the United States for the Southern District of Alabama to obtain, among other things, a foreclosure of said mortgage securing the payment of said endorsed bonds, in which that Court, in January, 1874, upon a hearing of all the parties, decreed, among other things, that a balance then remained due and unpaid on certain of the coupons payable prior to July, 1872, on said endorsed bonds; that the coupons on all of said endorsed bonds had been in default and overdue since and including those which fell due July 1, 1872, and were then in default and unpaid; that demand had been duly made for payment of all money in default; that the principal of said endorsed bonds had duly become due and payable; that said property of the company be sold at public auction as an entirety at Mobile, Ala.; that the commissioners appointed by the Court should, upon such sale and confirmation by the Court, convey all the right, title and property of the company in and to the railroad, franchises and other property, to the purchasers in fee simple, which should be a perpetual bar against the company, and the company should be forever foreclosed from all equity of redemption in said premises; that thereupon said railroad and property was duly sold at public auction January 22,

1877, to a purchaser other than the state, and the sale was duly confirmed by said Circuit Court June 19, 1877.

16. That in the endorsement and delivery to the Alabama and Chattanooga Railroad Company of said bonds of that company and the coupons attached, and in the issuance and delivery to it of said 2000 state bonds and the coupons attached, the state relied on the truthfulness of said false statements and on all the provisions of said acts, and especially on all said provisions relating to the obligation and liability to the state of the directors, officers, incorporators and stockholders of the company knowingly violating, or permitting the violation of, without objection, any provision of said act of February 11, 1870.

17. That a portion of the money accruing from the sales by the company of said endorsed bonds, namely, $160,000, was in May, 1869, knowingly and wrongfully appropriated to the defendants, and was not used nor applied in any way for the benefit of the company, nor for the purpose of constructing or equipping the railroad.

18. That in May, 1869, the company wrongfully and without valuable consideration issued to the defendants shares of its capital stock of the aggregate par value of $450,000, which the defendants then pretended to sell to the company, and in payment for which the defendants wrongfully received from the company $45,000 which had been received by the company from the sales of a portion of said endorsed bonds, which sum the defendants wrongfully appropriated to their own use, and which was not used nor applied in any way for the benefit of the company, nor for the purpose of constructing or equipping its railroad.

19. That in November and December, 1869, the defendants wrongfully appropriated to their own use the further sum of $118,000, which had been received by the company from the sales of a portion of said endorsed bonds, and which was not used nor applied for the benefit of the company, nor for constructing or equipping the railroad.

20. That in January and February, 1870, the defendants knowingly and wrongfully converted to improper uses, and not for the benefit of the company nor in the construction or equipment of its

railroad, the further sum of $400,000, which had been received by the company from sales of a portion of said endorsed bonds.

21. That in 1869 and 1870 the company, with the knowledge and participation of the defendants, wrongfully sold 112 of said endorsed bonds for 75 cents on the dollar, 100 of said endorsed bonds for 80 cents on the dollar, 500 of said endorsed bonds for 85½ cents on the dollar, 559 of said state bonds for 80 cents on the dollar, 112 of said state bonds for 75 cents on the dollar, 100 of said endorsed bonds for $82,040.48.

22. That the company, with the permission of the defendants, in 1869 and 1870, allowed $200,000 of said endorsed bonds and $150,000 of the proceeds of the sales of a portion of said endorsed bonds, to be wrongfully paid or given to various persons not entitled to any part thereof, known to the defendants not to be entitled to any part thereof; that the state has been continuously denied access to the books of the company, and has been unable to ascertain the names of all the persons to whom such unlawful payments or gifts were made, except the three named in the declaration, and that none of the said $200,000 of endorsed bonds and no part of said $150,000, the proceeds of sales of a portion of said endorsed bonds, was used or applied for the benefit of the company, or for the construction or equipment of its railroad.

23. That in 1869 and 1870 the defendants used a portion of said endorsed bonds, or the proceeds of the sales thereof, to the amount of $200,000, in purchasing for themselves capital stock of the Roane Iron Company and of the Meridian Railroad Company, and in opening and working a coal mine, no part of which was applied for the benefit of the Alabama and Chattanooga Railroad Company, or in the construction or equipment of its railroad.

24. That the Alabama and Chattanooga Railroad Company, with the participation and concurrence of the defendants, continuously, from the time of the endorsement of said endorsed bonds, has kept its books out of Alabama, and beyond the reach of the state, and fraudulently concealed from her all knowledge or information touching each of said wrongful acts, whereby the state is unable to make the allegations relating thereto more full or certain than as set forth in the declaration.

25. That by reason of said wrongful acts the company became

bankrupt in 1871, and unable to pay its indebtedness existing on and prior to September 1, 1871, and especially the interest on said endorsed bonds, which became due January 1, 1871, amounting to $188,800, and interest on said state bonds, which became due March 1, 1871, amounting to $80,000, and interest on said endorsed bonds, which became due July 1, 1871, amounting to $188,800, and interest on said state bonds, which became due September 1, 1871, amounting to $80,000; all of which sums of interest, aggregating $537,600, the state was compelled to pay and did pay to the holders of said bonds, which she would not have been compelled to pay but for said acts of the defendants, no part of which $537,600 has ever been repaid to her; and by reason of said acts of the defendants the plaintiff has been further damnified to the additional extent of $1,000,000, in settling her liability created and evidenced by said endorsements.

25. That the plaintiff has had no notice, information or knowledge of said wrongful acts of the defendants until within the year preceding the commencement of this suit.

26. That an action has accrued to the plaintiff to recover from the defendants compensation for the said losses.

The defendants have demurred to the declaration, assigning as grounds therefor that the remedy is in equity, that it is obtainable only in the courts of Alabama, that different and distinct causes of action are improperly united, and that there is a defect in the parties joined as defendants.

I.

As to the jurisdiction:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against embassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations, and

original, but not exclusive, jurisdiction of all suits brought by embassadors, or other public ministers, or in which a consul or vice-consul is a party."

U.S. Rev. Stat. § 687.

"The trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury."

Id. § 689.

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

Id. § 723.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish," &c.

Const. U.S. art. III. § 1.

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

Id. art. III. § 2.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted

against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Art. XI. Amendments to Const.

The jurisdiction of the *Circuit* Courts depends upon the acts of congress; they do not derive their judicial power immediately from the constitution.

> *Turner* v. *Bank of N. America*, 4 D. 10; *Sheldon* v. *Sill*, 8 H. 441; *Livingston* v. *Van Ingen*, 1 Pa. 45; *Smith* v. *Allyn*, ibid. 453; *Hubbard* v. *Northern R.R. Co.*, 3 Bl. C.C. 84; *Ex parte Cabrera*, 1 W. C.C. 232.

The *Circuit* Courts have no jurisdicton of a suit by a state against citizens of the same or of another state.

> *Gale* v. *Babcock*, 4 W. C.C. 199, 341; *Wisconsin* v. *Duluth*, 2 Dill. 406 (opinion by Mr. Justice MILLER); *North Carolina* v. *Trustees*, &c., 5 Nat. Bank. Reg. 466; *State* v. *Brailsford*, 2 Dall. 402.

State v. *Brailsford*, *ubi supra*, was a bill in equity, the State of Georgia asserting a claim to the debt in controversy by virtue of on act of confiscation. It was *held* that if the state had a right to the debt due originally from Spaulding to Brailsford, it was a right to be pursued at *common law*. An action *at law* was accordingly entered and tried at the bar of this court in February T. 1794 (3 Dall. 1), when a verdict was given to the defendant Brailsford. It was tried by a special jury, upon an amicable issue, to ascertain whether the debt due from Spaulding, and the right of action to recover it, belonged to the State of Georgia or to the original creditor, under the circumstances which are set forth in the pleadings and arguments on the equity side of the court.

Casey v. *Galli*, 94 U.S. 673, was an original action *at law* brought in this court by the receiver of a national bank to enforce the individual liability of the defendant (a subject of Italy, and its vice-consul at Philadelphia, Penn.) as a stockholder. The

parties *waived* the intervention of a *jury*, and the Court found the proofs in the record sufficient and ordered judgment against the defendant.

In *Texas* v. *White*, 7 Wall. 700, the Court, through Mr. Chief Justice CHASE, says (p. 719), —

"It is not to be questioned that this Court has original jurisdiction of suits by states against citizens of other states, or that states entitled to invoke this jurisdiction must be states of the union." The case was heard on bill, answers and proofs. It was held that the plaintiff state was entitled to the relief sought by her bill, and a decree was made accordingly.

State of Georgia v. *Stanton*, 6 Wall. 50, was also an original suit, by bill in equity, to enjoin the defendants from carrying into execution certain acts of congress, and dismissed on the ground that the bill called for a judgment on a *political* question. The *original jurisdiction*, however, was expressly recognized. Mr. Justice MILLER, delivering the opinion, says (p. 75), "By the 2d section of the 3d article of the constitution, the judicial power extends to all cases, in law and equity, arising under the constitution, the laws of the United States, &c., and as applicable to the case in hand 'to controversies between a state and citizens of another state,' which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree that the bill filed presents a case which, *if* it be the subject of *judicial* cognizance, would, in form, come under a familiar head of equity jurisdiction; that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate."

In *Kentucky* v. *Dennison, Governor*, 24 How. 66, the Court, through Mr. Chief Justice TANEY, says (pp. 97, 98), "In the first case to be found in our reports, in which a suit was brought by a state, it was entitled and set forth in the bill as the suit of 'the State of Georgia by Edward Tellfair, governor of the said state, complainant, against Samuel Brailsford and others,' and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of 'his excellency, Edward Tellfair, Esquire, governor and commander in chief in and over the State of

Georgia, in behalf of the said state, complainant, against Samuel Brailsford and others, defendants.' The cases referred to leave no question open to controversy as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the constitution, this Court has authority to exercise it without any further act of congress to regulate its process or confer jurisdiction, and that the Court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice; and that it has also been settled that where the state is a party, plaintiff or defendant, the governor represents the state, and the suit may be, in form, a suit by him as governor in behalf of the state, where the state is plaintiff."

In *State of Pennsylvania* v. *Wheeling Bridge*, 18 How. 460, a case of original jurisdiction, upon the equity side of the court, and a continuation of the suit between the same parties, reported in 13 How. 518, it was *held* that, the State of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the obstruction in the Ohio river, created by a bridge at Wheeling, had a sufficiently direct interest to sustain an application to this court, in the exercise of original jurisdiction, for an injunction to remove the obstruction, and that the remedy at law would be incomplete. The court says (p. 560), —

"From the dignity of the state the constitution gives it the right to bring an original suit in this court, and this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case." This case is also noticed in 9 How. 647, and in 11 How. 528. It was, after answer filed, referred to a commissioner to take proofs and report.

The declaration does not seek the enforcement of a *penalty*. It asks for the recovery of the amount of the actual loss caused the State of Alabama by the defendants, in violation of the obligations imposed upon and accepted by them under and by virtue of the statutes therein referred to, by virtue of which they became and are guarantors to the state, and liable to her for the payment of

that actual loss. From the declaration it appears that the state gave her aid to the company on the faith of the liability which the defendants had assented to be subject to.

In *Hawthorne* v. *Calef*, 2 Wall. 10, Mr. Justice NELSON, delivering the opinion of the Court, says (p. 21), "The question upon the provisions of the charter of the railroad company — in connection with the sale of the property by the plaintiff to the corporation, out of which this debt accrued — is, whether a contract, express or implied, existed between him and the stockholder. It is asserted, in behalf of the latter, that a contract existed only between the creditors and the corporation, and that the obligation of the stockholders rests entirely upon a statutory liability, destitute of any of the elements of a contract. . . . Now it is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company which have been contracted upon the faith of this liability. This question has been repeatedly before the courts of the State of New York, and they place the obligation of the stockholders upon two grounds. The first is that of contract. In *Corning* v *McCullough*, 1 Comstock, 47, 49, Chancellor JONES, then in the court of appeals, observes that the liability of the defendant, upon which the action is grounded, is for the payment of a debt of the company incurred by the purchase of merchandise of the plaintiffs for the use and benefit of the company, and wherein the defendant as one of the members was interested, and for which he thereby, and under the provisions of the charter, became and was, concurrently with the company, from the inception of the debt, personally liable. It is, he says, virtually and in effect a liability upon a contract and the mutual agreement of the parties; not, indeed, in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties."

In the present case the liability to pay money, fixed and im-

posed by the laws of the State of Alabama, and accepted by the defendants, can be enforced by the state beyond her territorial limits. Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action is in case, in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The fact that it is a statutory right cannot vary the principle. Persons legally liable in Alabama cannot escape that liability by being citizens of Massachusetts, New York or New Jersey.

Mostyn v. *Fabrigas*, 1 Cowp. 161; *Rafael* v. *Verelst*, 2 W. Bl. 983, 1055; *McKenna* v. *Fisk*, 1 How. 241; *Ex parte Van Riper*, 20 Wend. 614; *Lowry* v. *Inman*, 46 N.Y. 119; *Pickering* v. *Fisk*, 6 Vt. 102; *Railroad* v. *Sprayberry*, 8 Bax. (Tenn.) 341; *Great Western Railway Co.* v. *Miller*, 77 N.Y. 547; *Whitford* v. *Panama Railroad Co.*, 23 *id.* 465; *Vandeventer* v. *New York & New Haven R.R. Co.*, 27 Barb. 241; *Selma, &c., Railroad Co.* v. *Lacy*, 43 Ga. 461.

"It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the court to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right."

Dennick v. *Railroad Co.*, 103 U.S. 17.

"Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pur-

sued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

Ibid. 18.

"The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial."

Ibid. 18.

The Court says, in *Flash* v. *Coon*, 109 U.S. 379, —

"The right of the plaintiff to sue upon this liability in any court having jurisdiction of the subject matter and the parties, is therefore clear."

II.

The action at law is properly brought:

The declaration is in case. There is no necessity for setting forth successive counts. It would be impossible and not in accordance with the facts, admitted by the demurrers to be true, so far as they are well pleaded, to have separate counts set forth the statutory provisions relied upon, and aver *one* particular trespass or *one* violation of the obligations imposed upon and accepted by the defendants, and conclude that such single trespass, or such particular act in violation of their obligations, caused the loss for which the state seeks redress. It appears from the declaration that it was the *various* acts (and not one particular act) of the defendants, as therein specified (and with all the particularity of specification at the command of the plaintiff), in violation of the obligations imposed upon and accepted by them, that caused the company to become bankrupt, its property and franchise to be sold, its inability to pay the $537,600 interest on the endorsed and state bonds, and the payment of that precise sum by the state.

See *Bond* v. *Appleton*, 8 Mass. 472.

In that case the declaration was in case. By an act of the State of New Hampshire creating a banking corporation, it was provided that if the corporation should refuse or neglect to pay their

bills on demand, the original stockholders, their successors, assigns and the members of the corporation in their private capacities, should be liable to the holder.

See also *Gilbert* v. *Myers*, 18 Ala. 467.

Where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, an action on the case is the proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach; for that is the most accurate description of the real cause of action; and that form of action in which the real cause of action is most accurately described is the best adapted to every case.

Burnnett v *Lynch*, 5 B. & C. 609; 1 Saunders on Pl. & Ev. 715; 1 Chit. Pl. 123; *Dickson* v. *Clifton*, 2 Wils. 319; *Brotherton* v. *Wood*, 3 B. & B. 54; *Mast* v. *Goodson*, 3 Wils. 348; *Ansell* v. *Waterhouse*, 2 Ch. Rep. 1.

"A breach of duty in the defendant, and a damage resulting therefrom to the plaintiffs, is a proper subject for an action on the case in tort."

Per LITTLEHALE, J., in *Burnett* v. *Lynch*, *ubi supra*, 611.

III.

To the remaining ground of demurrer, *i.e.*, "that there is a defect in the persons joined as parties defendant in said suit," the answer is that the demurrers fail to point out what the defect is. The defendants do not, so far as shown by the demurrers, object that *they* are made defendants.

None of the defendants could have successfully pleaded in abatement. A plea in abatement can only be in those cases where regularly all the parties ought to be joined, and not where the plaintiff *may* join them all or not at his election.

Mitchell v. *Tarbutt*, 5 T.R. 649; *Rice* v. *Shute*, 5 Burr. 2613; *Child* v. *Sands*, 1 Salk. 32; *Addison* v. *Overend*, 6 T.R. 766.

"However, it is said that if the plaintiff himself shows in his declaration or other pleading that the tort was jointly done by the defendant *and A B* the action shall abate; . . . *but there does not seem to be any good ground for this distinction, and it seems contrary to the case of Child* v. *Sands*, 1 Salk. 32; *and the case of Addison* v. *Overend*, 6 T.R. 766, *lately decided, seems to have properly overruled the above distinction.*"

Cabell v. *Vaughn*, 1 Saund. 291 *e*.

"But if several persons jointly commit a *tort*, the plaintiff has his election to sue all or any number of the parties" (*ibid.* 291 *e*).

Sumner v. *Tileston*, 4 Pick. 308.

It is submitted that the demurrers should be overruled.

H. C. TOMPKINS,
SAM'L F. RICE,
E. S. MANSFIELD,
for Plaintiff.

11-413

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Supreme Court of the United States.

OCTOBER TERM, 1885.

Original No.

STATE OF ALABAMA, *Plaintiff*,

vs.

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ARGUMENT ON DEMURRER.

BRIEF FOR ISAAC T. BURR.

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BRIEF FOR THE DEFENDANT ON DEMURRER.

STATEMENT OF CASE.

THE plaintiff is the State of Alabama. The action is an original action at law to enforce the alleged liability of the defendants under certain Acts passed by the General Assembly of the plaintiff State, entitled as follows, to wit.:

"An Act to establish a system of internal improvements in the State of Alabama." Approved February 19, 1867.

"An Act to amend the law to establish a system of internal improvements in the State of Alabama." Approved September 22, 1868.

"An Act relating to the Wills Valley Railroad Company and the Northeast and Southwest Alabama Railroad Company," approved November 17, 1868; and

"An Act to loan the credit of the State of Alabama to the Alabama & Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said Company within the State of Alabama," approved February 11, 1870.

Copies of all said acts are annexed to the plaintiff's declaration, and referred to therein and made a part thereof.

Declaration pp. *26 et seq.*

The declaration alleges that the Alabama & Chattanooga Railroad Company became a duly existing corporation on December 19, 1868, and that from that time "continuously, until and at and after the time of the occurrence of the several and respective wrongs and injuries and losses to the plaintiff," alleged in said declaration, the defendants were "the majority and controlling incorporators, officers, directors, and stockholders, as well as the actual managers and controllers of the said Alabama & Chattanooga Railroad Company."

Declaration p. 8.

The Act approved February 19, 1867, provides for the endorsement by the State of the first mortgage bonds of railroad companies incorporated by the State of Alabama, under certain conditions, — the first endorsement for any Company to be made when it should have "finished, completed and equipped twenty continuous miles of road at either or both ends of the road" lying wholly or partly within the State.

Section 5 of said Act is as follows:

> "*Be it further Enacted*, That the bonds before specified shall not be used by said Company for any other purpose than the construction and equipment of said road; and the Governor shall not endorse the same unless on the affidavit of the president of said Company, and a resolution of a majority of its directory for the time being, that said bonds shall not be used for any other purpose than the construction and equipment of said road, or sold or disposed of for a less sum than ninety cents in the dollar; nor shall said bonds be endorsed until the president and chief engineer of said Company shall, upon oath, show that the conditions of this act have been complied with in all respects."

The Act of September 22, 1868, amended the Act of February 19, 1867, by raising the rate of endorsement from $12,000 per mile to $16,000 per mile, and by authorizing the endorsement of the bonds of any Railroad Company chartered by the State of Alabama having twenty continuous miles of road "finished, equipped and completed outside of the State of Alabama, and extending in the direction of its terminus within" the State, and guaranteeing to the satisfaction of the Governor of the State "the completion and equipment of said road to its terminus within the State of Alabama," etc.

Section one of the Act also provided "That no bonds endorsed under the provisions of this Act shall be sold for less than ninety cents on the dollar," and also "That the provisions of this section relating to the extension of railroads beyond the limits of this State shall not apply in favor of any other railroad company except the Wills' Valley Railroad Company."

The Act approved November 17, 1868, authorized the purchase of the Northeast and Southwest Alabama Railroad Company, by the Wills Valley Railroad Company, and thereafter the changing of the name of said last-named Company to that of the "Alabama & Chattanooga Railroad Company" and authorized the endorsement of the bonds of the Company at the rate of $16,000 per mile, and provided that "no bonds shall be sold for less than ninety cents on the dollar," and also "that the general laws on the subject of the endorsement of [railroad bonds shall apply to the endorsement of]* the bonds herein authorized [shall apply]† except in so far as the same may be modified or changed."

Nothing is said as to personal liability of the officers or stockholders of corporations obtaining the endorsement of the State under the Acts of September 22, 1868, and November 17, 1868.

It may be noted here, that the Act of September 22, 1868, though purporting to be a general Act, by its terms applies only to one railroad company, viz., the Wills Valley Railroad Company

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* This matter is in the original Act and should be inserted.

† These words should be omitted, not being in the original Act.

(see § 1 *ad fin.*), which by force of the Act of November 17, 1868, became the Alabama & Chattanooga Railroad Company.

Section 6 of the Act of February 19, 1867, contains the only specific provision for the liability of stockholders or officers under any of said three Acts providing for the endorsement of railroad bonds by the State, and is as follows :

> "*Be it further Enacted*, That it shall be the duty of the Governor, from time to time, when there shall be reliable information given to him that any railroad company shall have fraudulently obtained the endorsement of its bonds by the Governor on the part of the State, or shall have obtained the endorsement contrary to the provisions of this act, or shall have sold or disposed of the bonds endorsed by the Governor, for a less sum than ninety cents on the dollar, he shall notify the Attorney General of the State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the circuit or chancery court of the county of the place of business of the Company setting forth the facts; and when the fact shall satisfactorily appear to the Court that the endorsement of any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this act, or that said bonds shall have been sold or disposed of for a less sum than ninety cents on the dollar, then and in such case, the Court shall order, adjudge and decree that said road lying in the State, with all the property and assets of said Company, or a sufficiency thereof, shall be sold, and the proceeds thereof shall be paid into the treasury of the State; and it shall be the duty of the comptroller immediately to invest the same in State bonds, or the bonds endorsed by the Governor, under the provisions of this act, creating a sinking fund as provided for in the eleventh section of this act; and said Company shall forfeit all rights and privileges under the provisions of this act. And the stockholders thereof shall be individually liable for the payment of the bonds the endorsement of which was so fraudulently obtained by such Company, or which were sold or disposed of for less than ninety cents on the dollar, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such Company, excepting such stockholders as may show to the said Court that they were ignorant of or opposed the perpetration of such fraud by the Company."

The Act approved February 11, 1870, provided for the issuing of bonds by the State, to be delivered to the Alabama & Chattanooga Railroad Company in exchange for "an equal amount of first mortgage bonds of said Railroad Company"; and provided "That the bonds issued by virtue of this Act shall not be sold for a less sum than ninety cents on the dollar"; and "That no money accruing from the sales of the bonds specified in this Act, or bonds endorsed by the State for said Railroad Company, shall be applied in the construction or equipment of any railroad outside of this State or for other purposes."

The Act also provided "That the directors or other officers and incorporators and stockholders of said Railroad Company who shall knowingly violate or permit the violation without objection any provision of this Act or of the Act under which said Company is now receiving the endorsement of the State upon its bonds, of sixteen thousand dollars per mile, shall be held personally liable to the State for any loss incurred thereby."

The personal liability clauses of all said Acts have been set forth in full above.

It is to be observed that the Act of February 19, 1867, provides only for personal liability of *stockholders*, while the Act of February 11, 1870, makes the "directors or other officers and incorporators and stockholders" liable for loss.

The violations by the Company of the several acts complained of in the declaration, and for which it is sought to hold the defendants liable, are as follows: —

First. With respect to the Statutes authorizing the Governor to endorse railroad bonds, the wrongs complained of, briefly stated, are: —

a. The issuing of the first mortgage bonds with fraudulent intent to procure the State's endorsement, and the obtaining of such endorsement by false and fraudulent representations, upon which the Governor relied in endorsing the bonds.

These false and fraudulent representations are alleged to have been with reference to the length of road, which said Company had completed and equipped at the time of obtaining the endorsement.

b. "In or about" May, 1869, the misappropriation of proceeds of the sales of endorsed bonds by the Company by appropriating them "to the defendants and their accomplices in the wrong and fraud," instead of to the construction and equipment of the road.

c. "In or about" the month of May, 1869, the fraudulent issue by the Company "to the defendants and their accomplices in the fraud" of shares of the Company's capital stock and the repurchase thereof by the Company with proceeds of sales of endorsed bonds, which "the defendants fraudulently appropriated to their own use and not for the benefit of the Company."

d. In November and December, 1869, the misappropriation by the defendants "to their own use and the use of their accomplices" with the fraudulent permission of the Company, of various sums of money, proceeds of sales of endorsed bonds.

e. In January and February, 1870, the misappropriation by the defendants with the permission of the Company, of the sum of $400,000, proceeds of sales of endorsed bonds.

f. The sale and disposal of bonds by the Company, "with the knowledge and participation of the defendants" during the years 1869 and 1870, at less than ninety cents on the dollar.

g. The pledging by the Company of bonds, "with the knowledge and permission" of the defendants, as collateral security for the payment of amounts due by the Company, which were less than ninety per cent of the bonds pledged.

h. Misappropriation by permitting unlawful payment, or gift to various persons, with the permission of the defendants, of bonds and proceeds of sales of bonds.

i. Misappropriation by permitting the defendants, in the years 1869 and 1870, to use bonds, or the proceeds of sales thereof, in purchasing property for themselves.

j. That by reason of the alleged wrongful, illegal and fraudulent acts of the Company permitted and participated in by the defendants, the Company became bankrupt in the year 1871, and the State was obliged to pay the interest on said endorsed bonds and on the State bonds issued under Act of February 11, 1870, accruing January and July 1, 1871.

Second. With respect to the State bonds issued under Act of February 11, 1870, in exchange for the Company's first mortgage bonds, the wrongs complained of in the declaration are:—

The disposal of a portion of said State bonds by the Company with the knowledge and participation of the defendants, during the year 1870, at less than ninety cents on the dollar.

The declaration also alleges that the plaintiff "had no notice, information or knowledge of the wrongful, illegal and fraudulent acts of the said defendants and said corporation," alleged in the declaration, until within the twelve months next prior to the filing thereof (p. 23).

The declaration concludes, "Whereby and by force of the said Acts of the general assembly of the plaintiff approved February 19, 1867, September 22, 1868, November 17, 1868, February 11, 1870 respectively an action hath accrued to the plaintiff to recover against the said defendants," etc.

This defendant demurs generally to the declaration, noticing as causes of demurrer the following:—

I. That the plaintiff's remedy, if any, is in equity.
II. That it is in the Courts of Alabama.
III. Misjoinder of causes of action.
IV. Nonjoinder of parties.
V. Want of jurisdiction.

POINTS OF LAW.

THE PLAINTIFF'S REMEDY, IF ANY EXISTS, IS IN A COURT OF EQUITY.

a. As to violations of the acts under which the endorsement of bonds by the State was obtained, the only provision prior to February 11, 1870, for the liability of stockholders is contained in the sixth section of the Act approved February 19, 1867, which provides as follows: "That it shall be the duty of the Governor from time to time, when there shall be reliable information given to him that any railroad company shall have fraudulently obtained the endorsement of its bonds by the Governor on the part of the State, or shall have obtained the endorsement contrary to the provisions of this Act, or shall have sold or disposed of the bonds endorsed by the Governor, for a less sum than ninety cents in the dollar, he shall notify the Attorney General of the State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the *circuit or chancery* Court of the county of the place of business of the Company, setting forth the facts; and when the fact shall satisfactorily appear to the Court that the endorsement of any of said bonds shall have been fraudulently obtained, or

obtained contrary to the true intent, meaning and provisions of this Act, or that said bonds shall have been sold or disposed of for a less sum than ninety cents on the dollar, then and in such case the Court shall order, adjudge and decree that said road lying in the State, with all the property and assets of said Company, or a sufficiency thereof shall be sold and the proceeds thereof shall be paid into the treasury of the State; and it shall be the duty of the comptroller immediately to invest the same in State bonds, or the bonds endorsed by the Governor, under the provisions of this Act, creating a sinking fund, as provided for in the eleventh section of this Act, and said Company shall forfeit all rights and privileges under the provisions of this Act.

> And the stockholders thereof shall be individually liable for the payment of the bonds, the endorsement of which was so fraudulently obtained by such Company, or which were sold or disposed of for less than ninety cents in the dollar, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such Company, *excepting* such stockholders as may show to the *said* Court that they were ignorant of or opposed the perpetration of such fraud by the Company." (Act of February 19, 1867, § 6; Declaration, pp. 34 and 35.)

The same section, therefore, that creates the liability, provides the remedy and the mode of enforcing such liability, namely, through a suit in a Court of Equity wherein the corporation and *all* the stockholders shall be before the Court, and after proof of the fraudulent or illegal acts of the corporation a decree is to be made against the corporation and *all* the stockholders, *excepting* those who can show to "*said Court* that they were ignorant of or opposed the perpetration of such fraud by the Company," the burden being placed upon the several stockholders to show their innocence, the Company's fraud having been proved.

That this is the true construction of the sixth section is plain, not only from the obvious meaning of the words used, but also from the interpretation given to it by the Supreme Court of the State of Alabama.

In the case of *The State ex rel. Plock & Co.* vs. *Cobb*, 64 Ala., 127, at 155, decided in 1879, Brickell *C. J.* says: —

> "That the endorsement might possibly be obtained fraudulently or obtained without fraud in violation of the Statutes; or that when endorsed the

bonds might be sold or disposed of for less than ninety cents on the dollar, was apprehended by the General Assembly and provision made for the protection of the State in either event. *Then* the Attorney General on being notified by the Governor, was required to institute suit against the *Railroad Company*; and on *proof of the facts*, a decree of sale of the road was to follow and the proceeds of the sale was to be paid into the State treasury, to *form a fund* for the payment of the bonds endorsed by the Governor, as well those on which the endorsement was improperly as those on which it was properly obtained."

There would, after this statement by the highest tribunal of the State, seem to be no doubt of the mode of procedure intended by the Statute in case of violation of its provisions —

See Douglas *v.* Pike County, 101 U. S. 677.
Rowan *v.* Runnells, 5 How. 134.
Lamborn *v.* County Commissioners, 97 U. S. 181.
Davis *v.* Briggs, 97 U. S. 628.
Railroad Companies *v.* Gaines, 97 U. S. 697.

to the effect that the construction put upon a statute by the highest tribunal of the State which enacted it, will be adopted by this Court.

And this construction agrees with the construction by this Court of § 13 of An Act passed by the State of Tennessee, February 11, 1852, the words of which section are verbatim the same as those of § 6 of the Act now under consideration.

Tennessee Bond Cases, 114 U. S. 663, at 702.

"Where a Statute creates a right and prescribes a remedy, the remedy prescribed is the only remedy."

Moies *v.* Sprague, Admr. 9 R. I. 541 per Durfee *J.* at p. 543.

"The individual liability of Stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist * * * A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled

obtained contrary to the true intent, meaning and provisions of this Act, or that said bonds shall have been sold or disposed of for a less sum than ninety cents on the dollar, then and in such case the Court shall order, adjudge and decree that said road lying in the State, with all the property and assets of said Company, or a sufficiency thereof shall be sold and the proceeds thereof shall be paid into the treasury of the State; and it shall be the duty of the comptroller immediately to invest the same in State bonds, or the bonds endorsed by the Governor, under the provisions of this Act, creating a sinking fund, as provided for in the eleventh section of this Act, and said Company shall forfeit all rights and privileges under the provisions of this Act.

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There would, after this statement by the highest tribunal of the State, seem to be no doubt of the mode of procedure intended by the Statute in case of violation of its provisions —

See Douglas *v.* Pike County, 101 U. S. 677.
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to the effect that the construction put upon a statute by the highest tribunal of the State which enacted it, will be adopted by this Court.

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"Where a Statute creates a right and prescribes a remedy, the remedy prescribed is the only remedy."

Moies *v.* Sprague, Admr. 9 R. I. 541 per Durfee *J.* at p. 543.

"The individual liability of Stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist * * * A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled

with a provision for a special remedy, that remedy and that alone must be employed." Per Mr. Chief Justice Waite in *Pollard* v. *Bailey*, 20 Wall, 520 at 527.

Erickson *v.* Nesmith, 4 All. 233, at 236.
The Vestry, etc. *v.* Batterbury, 2 C. B. (N. S.) 477.

As to all violations by the Company of the Acts under which the endorsement of bonds by the State was obtained, alleged to have taken place prior to the Act of February 11, 1870, it is submitted that the only remedy, if any, open to the plaintiff for the wrongs complained of is that prescribed by the Statute, viz., a suit to which the corporation shall be a party in the "Circuit or Chancery Court of the county of the place of business of the Company."

Section One of the Act approved February 11, 1870 (under which the State of Alabama issued its bonds in exchange for first mortgage bonds of the Alabama & Chattanooga Railroad Company), provides that "the directors or other officers and incorporators and stockholders of said Railroad Company who shall *knowingly* violate, or permit the violation *without objection*, any provision of this Act or of the Act under which said Company is now receiving the endorsement of the State upon its bonds of $16,000.00 per mile shall be held personally liable to the State for any loss incurred thereby."

This provision can only apply to violations of the Act under which the State's endorsement was received, committed subsequent to the passage of said Act of February 11, 1870.

But it is submitted that there is nothing in the Act of February 11, 1870, to indicate any intention on the part of the General Assembly of Alabama to repeal the provisions of Section Six of the Act of February 19, 1867, (to which Act the Act of February 11, 1870, refers), or to alter the mode of procedure therein provided; but on the contrary, the similarity of the offences upon which the liability is based in the two Acts respectively, and of the language of the two Acts, furnishes strong evidence, if not conclusive proof, that the second Act is reiterative of the first, with respect to per-

sonal liability, adding thereto a liability for violation of the second Act, to be enforced in the same manner as provided in the first Act.

It is to be observed that by the terms and provisions of section six of the Act of February 19, 1867) all stockholders are liable *excepting* such as show the Court that "they were ignorant of or opposed the perpetration" of the Company's frauds; and in the Act of February 11, 1870, directors, officers, incorporators and stockholders "who shall *knowingly violate or permit the violation without objection*" of any provision of either of said Acts are liable, the language in each case being substantially the same.

It is not to be assumed that the Statute meant to make the remedy for violations subsequent to the passage of the Act of 1870 different from that given for like violations prior thereto, unless there is some express provision in the second, altering or repealing or inconsistent with the provision in the first.

But if the Act of February 11, 1870, contemplated a different remedy from that provided in the Act of February 19, 1867, then it is clearly a misjoinder of causes of action to seek recovery for violations of both in the same suit, to which point we shall refer hereafter.

Nearly all the wrongs complained of in the declaration are alleged to have occurred prior to the passage of the Act of February 11, 1870.

b. But even if the Act of February 19, 1867, were silent as to the mode of enforcing the stockholders' liability, it is submitted that the plaintiff's remedy would be in equity alone.

In the case of *Stone* vs. *Chisolm*, 113 U. S. 302, the plaintiff sought to enforce the individual liability of directors of a Phosphate Manufacturing Company by an action at law, under the following statutory provision:

> "The total amount of debts which such Corporation shall at any time owe shall not exceed the amount of its capital stock actually paid in; and in case of excess, the directors in whose administration it shall happen shall be personally liable for the same, both to the contractor or contractors and to the Corporation. Such of the directors as may have been absent when the said excess was contracted or created, or who may have voted against such contract or agreement and caused his vote to be recorded in the minutes of the board, may respectively prevent such liability from attaching to themselves by forthwith giving notice of the fact to a general meeting of the stock-

holders, which they are authorized to call for that purpose. The provisions of this section shall not apply to debts of railroad corporations secured by mortgage."

In delivering the opinion of the Court, Mr. Justice Matthews says :—

"* * * No special remedy being prescribed by statute for enforcing the liability defined by that section (*supra*) from a consideration of its nature and the circumstances which are made the conditions of it, we are led to the conclusion that the only appropriate remedy in the Courts of the United States is by a suit in equity.

"The conditions of the personal liability of the directors of the Corporation expressed in the Statute are that there shall be debts of the Corporation in excess of the capital stock actually paid in, *to which the directors sought to be charged shall have assented*, and this liability is for the *entire excess* both to the creditors and to the Corporation. To ascertain the existence of the liability in a given case, requires an account to be taken of the amount of the corporate indebtedness, and of the amount of the capital stock actually paid in; facts which *the directors, upon whom the liability is imposed*, have a right to have determined, once for all, in a proceeding which shall conclude all who have an adverse interest and a right to participate in the benefit to result from enforcing the liability. * * * * It is immaterial that in the present case it does not appear that there are other creditors than the plaintiffs in error. There can be but one rule for construing the section, whether the creditors be one or many."

Stone *v.* Chisolm, 113 U. S. 302 at 308.

(The *italics* are our own and are not in the report of the case.)

The reasoning in the above case is directly applicable to the facts of the case at bar, and the cases are in many respects alike. In both cases, those who are ignorant of, or oppose, the violations of the respective Acts are not liable, but the burden is upon them to show their innocence. In *Stone* v. *Chisholm*, the Court bases its decision that the proper remedy in such cases is in equity upon the theory that an account must be taken to determine the extent of the liability of the directors, and that the directors have a right to have the facts "determined once for all in a proceeding which shall include all who have an adverse interest."

In the case at bar, while it is true that in the Statute of February 19, 1867, Section six provides that the Stockholders shall be individually liable for the payment of the bonds the endorsement of which was fradulently obtained by the Company or which were sold or disposed of for less than ninety cents on the dollar, still it

should be noticed that there is added to these specifications of liability the words "and for all *other losses* that may fall upon the State in consequence of the commission of any other fraud by such Company," by which it is seen that the legislature intended to provide against "*losses*," in the cases specified, as well as losses generally.

Tennessee Bond Cases, 114 U. S. 663.

And what the losses were in consequence of the endorsement obtained by fraud or of the disposal of bonds at less than ninety cents on the dollar was to be determined in the manner provided in the Statute; namely, by a suit against the corporation, and a decree, in case the frauds were proved, for the sale of the road lying in the State, and all the Company's property and assets, the proceeds of the sale to be invested as therein directed, and to form a sinking fund for the payment of said endorsed bonds, — the amount which the State would be forced to pay by reason of its endorsement being reduced and its loss diminished in proportion to the increase of the fund. It is obvious that the amount of such loss, and in consequence the amount for which the Stockholders should be held liable, could only be determined by an accounting after proceeding as laid down in said section six against the corporation. It is further plain, not only from the words of said section, but from general principles of equity that all Stockholders should have the right to show both the Company's and their own innocence of the fraud alleged in such suit, every Stockholder being directly interested not only in showing his own and the Company's innocence, and failing in that, the guilt and consequent liability of the other Stockholders. In short it was the object of the Statute, in case of fraud by the Company, to provide a fund to which all Stockholders knowing and not opposing the fraud should contribute, such fund to be in addition to the Company's property and assets, security to the State against loss by its endorsement, and it is obvious that, in a Court of Equity alone, could the rights of all parties be determined and preserved.

Pollard *v.* Bailey, 20 Wall, 520.
Stone *v.* Chisolm, *ubi Supra.*
Mann *v.* Pentz, 3 N. Y. 415 at 423.
Harris *v.* First Parish in Dorchester, 23 Pick. 123.
Appeal of Joseph M. Means, et al, 85 Pa. St. 75.
State Ex. rel Plock *v.* Cobb, 64 Ala. 127 at 155.
Smith *v.* Huckabee, 53 Ala. 191.

In *Pollard* vs. *Bailey* (cited *supra*), in which the action was at law to enforce the liability of the stockholders of a bank, who under its charter were "bound respectively for all the debts of the bank in proportion to their stock holden therein," Mr. Chief Justice Waite says, at p. 524:—

> "Each stockholder is bound for the debts in proportion to his stock. His liability is not limited to the *par* value of his stock, neither is he bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital and is not required to pay more. * * * * * * This proportion can only be ascertained upon an account of the debts and stock and *pro rata* distribution of the indebtedness among the several stockholders. The proper action therefore to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, which can bring before it all the necessary parties and adjust all their rights. Every stockholder when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors."

And in the case of *Smith* vs. *Huckabee*, 53 Ala. 191, where the question was as to the proper proceeding for a creditor to enforce the stockholders' liability under the following provision, namely, "The stockholders of any such corporation [manufacturing and other corporations] are liable for all debts due by it at the time of its dissolution to the extent of their stock." Bricknell, C. J. held the proper remedy to be in equity and not at law, and strongly intimates that a Court of Equity is the only proper place in which to enforce stockholders' liability.

In *Mann* vs. *Pentz* (*supra*), which arose on the Statute making stockholders liable in case the capital stock of a corporation should not be paid in, the court says:

> "The liability is therefore clear, but how is it to be enforced? The Statute itself does not define the method to be pursued, but leaves the remedy to be enforced by such practice and in such form as the nature of the right to be asserted and the relief sought may require. It being a statute liability if the receiver can select one stockholder, and collect the whole amount unpaid upon his shares of the stock there is no reason why his remedy is not as perfect at law as in equity. But the nature of the right to be enforced and the circumstances under which it is to be enforced render the proceedings under this Statute eminently proper for a Court of Equity, and the practice should be such as to effect the equitable designs of the Statute and not be unnecessa-

rily oppressive upon those against whom the proceedings are directed. This liability is only incurred when the capital paid in is not sufficient to satisfy the debts against the corporation, and then only to an amount sufficient to satisfy such debts. It is therefore necessary that an account of the assets and of the debts should be taken, of the amount of the capital stock remaining unpaid upon the shares, and the amount unpaid by each stockholder, in order that they may be made equally liable. I can see no way in which this could be effected under the practice before the code, except by a bill filed in behalf of all the creditors against the corporation, making the delinquent stockholders also defendants. The Court would then have the power to do complete justice and make each delinquent stockholder pay his due proportion and no more."

This reasoning applies forcibly to the case at bar. In the latter the liability is only in case of loss, and is limited by the loss. This requires an accounting, and a Court of Equity is the only proper tribunal to adjust the rights of all. Every stockholder who does not prove to the Court his ignorance of or opposition to the fraud proved is equally liable to contribute to make up the loss, if any, to the State by reason of its endorsement, but such liability is secondary. It by no means follows that because the acts forbidden have been committed, that loss will fall upon the State. *Non constat* that notwithstanding the frauds, the Company's property and assets may be sufficient to pay the bonds and the State incur no loss by its endorsement.

See Appeal of Joseph M. Means *et al.* 85 Penn. St. 77.

It also appears from the declaration (pp. 16–18) that the plaintiff purchased the said Alabama and Chattanooga Railroad on April 22, 1872, and so far as appears continued to hold the same until it was sold on January 22, 1877, a period of nearly five years, and it is evident that the State must account for the receipts thereof during that period, before its loss and the consequent liability of the stockholders can be determined. Such an accounting can only be obtained in a Court of Equity where all the parties in interest are before the Court. This alone seems a sufficient reason why the State should proceed in equity rather than at law.

But aside from the authorities which appear to be decisive of the question, it seems clear from the language of the Statute that the State intended to provide against loss to itself, because of the

fraud of the Company by creating a fund in addition to the corporate property, by imposing a personal liability upon the stockholders. Such a liability is entirely the creature of the Statute and is to be construed strictly and not "extended by implication."

If then it be held that the Statute is silent upon the question of the remedy and the manner of enforcing the liability, it is submitted that on the authorities, and according to sound reasoning, the *appropriate* remedy, which is always the one allowed when the Statute is silent on the subject, is in equity.

Pollard *v.* Bailey, *ubi supra.*
Terry *v.* Little, 101 U. S. 216.
Hornor *v.* Henning, 93 U. S. 228.
Mills *v.* Scott, 99 U. S. 25.

The same reasoning and authorities apply to the provision of the statute of February 11, 1870, where the only liability is, in terms, for "*losses to the State*," and nothing is said in regard to the remedy or the manner of enforcing the liability.

By Section One of the Act of February 11, 1870, it is provided that in exchange for the State bonds issued under that Act to the Alabama and Chattanooga Railroad Company, the Company shall give to the State its bonds, secured by first mortgage upon "the lands granted by the United States to said Railroad Company and upon any interest which said Company now has or may hereafter lawfully acquire in or to said lands, with this reservation, that the said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the Act of Congress granting the same.

> *Provided, however*, That the proceeds of said sales shall be appropriated to the payment of the aforesaid first mortgage bonds of the said Railroad Company issued to the State."

It is obvious that the defendants are entitled to have an accounting of what has been received by the plaintiff under this provision, as bearing on the question of the loss sustained by the State by reason of the issue of said bonds, — it being for the "*loss incurred*" by the State, and that only, that the Statute creates a liability.

It is equally clear that the defendants should have an account of what, if anything, has been received by the State by virtue of the further mortgage required by said Statute to be given by said Company to the State, as follows: —

> "*Provided further*, That the Governor shall require said Railroad Company before issuing to said Company said bonds, to give to the State of Alabama a first mortgage on the telegraph line and telegraph offices along the line of said Road belonging to said Company; also on the machine shops and all property in the State and in Georgia, Tennessee and Mississippi belonging to said Company; also on all coal mines now open or hereafter to be opened and worked belonging to said Company; also upon all iron or mineral lands and all iron manufacturing establishments now in operation, and hereafter to be constructed."

Such a mortgage must have been given, as a condition precedent to the issuing of the bonds. Clearly the defendants are entitled to an accounting of the proceeds of sales and income received by the State by virtue of said mortgages as bearing very materially on the "loss incurred," and equally clearly, a Court of Equity is the only tribunal, both on principle and authority, in which such accounting can properly be taken.

Pollard *v.* Bailey, 20 Wall. 520.
Hornor *v.* Henning, 93 U. S. 228.

II.

THE PLAINTIFF'S REMEDY, IF ANY EXISTS, IS IN THE COURTS OF ALABAMA.

a. The statutes so provide expressly in the Act of February 19, 1867, and by implication in the Act of February 11, 1870.

Upon this point reference is made to the reasoning and authorities under Point I, Subdivision *a*.

b. But if the Court shall be of opinion that the remedy is not provided or indicated in the statutes creating the liability sought

to be enforced, or that a Court of Equity is not the proper and only tribunal in which to enforce such liability, then it is submitted that the Statutes creating such liability are penal and are therefore strictly local, and can only be enforced in the jurisdiction of the State where the statutes were passed.

Steam Engine Co. *v.* Hubbard, 101 U. S., 188.
Chase *v.* Curtis, 113 U. S. 452.
Diversey *v.* Smith, 103 Ill., 378.
Bank *v.* Price, 33 Md., 487.
Lawler *v.* Burt, 7 Oh. St., 340.
Derrickson *v.* Smith, 27 N. J. L., 166.
Halsey *v.* McLean, 12 All., 438.
Bird *v.* Hayden, 1 Robt. (N. Y.), 383.
Moies *v.* Sprague, Admr. 9 R. I., 541.

1. The liability is in the nature of a penalty.

In the case of Steam Engine Co. *v.* Hubbard (*supra*) which was an action to enforce the liability of officers of a Connecticut corporation under a statute making all the officers of the corporation in case of neglect to file a certain certificate liable, for the debts of the corporation contracted, while such neglect continued, Clifford J. says: —

> "Repeated instances have occurred where suit was brought in one State to enforce the statute liability for the debts of a corporation created by the legislature of another State, in all which it is held that the Statute is penal and that it can only be enforced in the State where the Statute was passed. * * * * Corresponding decisions have been made in other Courts and to such an extent as to justify the remark that the rule is universal."

This case was cited with approval and its doctrine reaffirmed in the very recent case of *Chase* vs. *Curtis*, (*ubi supra.*)

In *Diversey* vs. *Smith* the question was as to the survival of an action to enforce the liability of a stockholder under the Illinois Statute forbidding Insurance Companies to begin business until the capital was wholly paid in and a certificate of the payment in thereof had been filed in accordance with the Statute. Section 16 of that Statute provides that "the trustees and corporators of any

Company organized under the Act shall be severally liable for all debts or responsibilities of such Company to the amount paid by him or them subscribed, until the whole amount of the capital of such Company shall have been paid in, and a certificate thereof recorded as hereinafter provided."

Scholfield, J. in delivering the opinion of the Court, says, "If the action is for a statutory penalty, it does not survive the death of the testator. * * * * The question therefore is, whether the action is on a contract or for a statutory penalty." The question arose upon a demurrer to the declaration, and after a very full and careful examination of the authorities, the Court held that the Statute was penal, and sustained the demurrer. The opinion contains many things forcibly bearing upon the case now before the Court, notably the following:

At page 389 the Court says,

> "The Company is treated as primarily liable, and the trustees and corporations are held liable not because of *their* debt or responsibility, or of *their and the Company's* debt or responsibility, but solely on account of the debt or responsibility of the Company."

And at p. 394 —

> "The debts for which the stockholders * * * * are sought to be held liable were contracted in violation of the law."

And again, at p. 400 —

> "In our opinion, counsel are entirely mistaken in saying 'the Statute does not prescribe some new duty, or forbid some wrongful act, and declare this liability as a penalty.' It forbids the wrongful act of proceeding with business and issuing policies when the capital stock is not all paid in and the certificates required by the 10th section are not filed and declares this liability in consequence of—in other words, as a punishment for—that wrongful act."

And after carefully considering those cases in which the liability arising on Statutes providing that the stockholders of a corporation shall be jointly and severally personally liable for the payment of all debts and demands contracted by the corporation, has been held to be primary and *ex contractu*, as in

Corning *vs.* McCullough, 1 Comst. 47,

the Court distinguishes them from the case then under consideration as follows (p. 394):

> "Here the Statute in effect says the thing shall not be done, and if it is done the trustees and incorporators shall be liable, etc. In all the cases referred to the Statute says the thing may be done and the stockholders, etc., shall be liable, either absolutely or until some subsequent thing shall be done. In the one case the liability is in consequence of violating the law or suffering it to be violated; in the other the liability is incurred in strict compliance with the law,—in short, in the one case the liability is for a wrong done—a *tort;* in the other it is upon contract."

Applying the reasoning of the Court in this case and in the other cases cited *supra*, all of which are of a similar nature, and in all which the same conclusion is reached, to the case at bar, there seems no room for doubt that the Statutes now under consideration are penal in so far as they relate to the liability of the officers and stockholders of corporations.

Section 5 of the Act of February 19, 1867 (*supra*), expressly forbids (1) the use of the endorsed bonds by the Company for any other purpose than the construction and equipment of its road; (2) the sale or disposal of said bonds for less than ninety cents in the dollar; (3) the endorsement of said bonds until the president and chief engineer of said Company shall on oath show that the conditions of the Act have been complied with. And Section 6 of the same Act makes all stockholders of the Company liable for the bonds "the endorsement of which was fraudulently obtained (*i. e.*, by false oath), or which were sold or disposed of for less than ninety cents on the dollar, and for all other losses that may fall upon the State in consequence of the commission of any other fraud *by such* Company, *excepting* such stockholders" as may show to the Court their ignorance of or opposition to the perpetration of the fraud by the Company. The statute which alone creates the liability imposes it upon the stockholders (to use Mr. Justice Scholfield's language), "in consequence of—in other words, as a punishment for—the wrongful act." No liability for the debts of the Company, not even for those evidenced by the bonds obtained or disposed of in violation of the Act, attaches to the stockholders. The statute in effect says to the stockholders: "If loss falls upon the State by reason of your knowledge or assent to violations of this Act by the Company, you must bear the burden of that loss

as a punishment for knowingly permitting, without objection, such violations, and the burden is upon you to show your ignorance thereof or opposition thereto." Nothing can be more clear than that such a provision is "rigorously penal," and in no respect imposes a liability *ex contractu.*

The argument is equally strong with reference to the Statute of February 11, 1870. There the provision is that the "directors or other officers and incorporators and stockholders of said railroad company, who shall knowingly violate, or permit the violation without objection, of *any provision* of this act or of the act under which said company is now receiving the endorsement of the State upon its bonds, of $16,000 per mile, shall be held personally liable to the State for any loss incurred thereby." The statute directs the purpose for which the bonds shall be used and forbids the disposal of any of the bonds at less than ninety cents in the dollar, and punishes the violation of its mandates by making the managers and incorporators knowingly violating or permitting the violation of the same by making them personally liable for any resulting loss.

"A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited."

Potter's Dwarris on Statutes. 74.

It "may also be remedial, and a statute may be remedial in one part and penal in another."

Sedgwick, Stat. and Const. Law (2d ed), 32.
Wynne *vs.* Middleton, 1 Wils., 126.

To quote again the language of Mr. Justice Scholfield in *Diversey* vs. *Smith* (*supra*) : —

> "It is the effect, not the form of the Statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it — *i. e.*, doing what is prohibited or failing to do what is commanded to be done — it is penal in its character, and the circumstance, that in punishing, a remedy is likewise afforded to those having an interest in the observance of the Statute is unimportant."

Thus far we have based the argument on the supposition that the State in this case is in the same position as any creditor of a corporation would be, supposing the Statute to have imposed a general liability upon the stockholders, so that it could be enforced by any person holding any of the bonds issued or disposed of in violation of the Statutes, or by any creditor of the corporation. But if, as seems probable from the wording of both the Statutes in question, the State reserved to itself the right of enforcing the liability imposed, then the argument that the Statute is penal becomes even stronger. In such case the Statutes are clearly the same as if they had provided for the indictment and criminal prosecution of the officers or stockholders knowingly violating or permitting the violation of the respective Statutes, the forfeiture or penalty therefor being an indefinite sum, depending on the damage resulting from such violations, instead of a fixed sum as is usual in case of violations of penal Statutes; and the nature of the Statute would obviously not be changed, but only the mode of enforcing the penalty, namely, by a civil action, which is the appropriate one for determining a question of damages, instead of a criminal action or prosecution, by which fixed penalties or forfeitures are usually recovered.

It is submitted, therefore, that both on principle and authority the Statutes in question are highly penal in their nature, and are to be treated as penal Statutes.

b. "Penal laws are strictly local and affect nothing more than they can reach."

Flash *v.* Conn. 169 U. S. 371 at 376 per Woods *J.*

"It is well settled that no State will enforce penalties imposed by the laws of other States; such laws are universally considered as having no extra-territorial operation or effect."

First Nat. Bank *v.* Price, 33 Md. 487 at 492.
Derrickson *v.* Smith, 27, N. J. L. 166.
West. T. & Coal Co. *v.* Kilderhouse, 87 N. Y. 435.
Erickson *v.* Nesmith, 4 All. 233.
Halsey *v.* McLean, 12 All. 438.

In *Steam Engine Co.* v. *Hubbard* (*supra*), Mr. Justice Clifford says: "Repeated instances have occurred where suit was brought in one State to enforce the Statute liability for the debts of a corporation created by the Legislature of another State, in all which it is held that the Statute is penal, and that it can only be enforced in the State where the Statute was passed * * * * to such an extent as to justify the remark that the rule is universal."

If, then, the Statutes in question are considered penal it can hardly be contended that they can be enforced in any Court outside of the State of Alabama.

Nor does the fact that the plaintiff in this case happens to be a State, and therefore is suing in a United States Court, alter the principle.

It is an attempt by the State of Alabama to enforce in the Supreme Court of the United States a penal Statute of the State of Alabama against persons who are neither citizens of, nor residents in, that State, and who have not been served with process there.

It is submitted that this cannot be done for the following reasons:

1. The United States Courts will not take cognizance of the penal Statutes of any State for the purpose of enforcing them.

Take, for instance, crimes and criminal laws.

It is well settled that the United States Courts have no criminal jurisdiction, except over acts expressly made criminal either by the United States Constitution or by Act of Congress passed in pursuance of power granted by the Constitution. Chase, *J.* in *United States* v. *Worrall*, 2 Dall., 384, 393, says:—

> "In this country every man sustains a two-fold political capacity: one in relation to the State and another in relation to the United States. In relation to the State, he is subject to various municipal regulations founded upon the State constitution and policy, which do not affect him in his relation to the United States: for the constitution of the Union, is the source of all the jurisdiction of the national government; so that the departments of government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases which the 8th section of the 10th article desig-

nates, there is a power granted to Congress to create, define and punish crimes and offences whenever they shall deem it necessary and proper by law so to do, for effectuating the objects of the Government. * * The question does not arise however, about the power, but about the exercise of power. Whether the Courts of the United States can punish a man for any act before it is declared by a law of the United States to be criminal? Now it appears to my mind to be as essential that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction * * In my opinion the United States as a Federal Government have no common law: and consequently no indictment can be maintained in their Courts for offences merely at the common law."

In United States *v.* Burr, 2 Burr's Trial, 482, Marshall, *C. J.* says: —

"Now in criminal cases, the laws of the United States constitute the *sole* rule of decision; and no man can be condemned or prosecuted in the Federal Courts on a State law."

In *United States* vs. *Hudson & Goodwin*, 7 Cranch, 32, it was held in the Supreme Court that the jurisdiction of the United States Courts over crimes was limited to such as had been expressly declared by Congress. The decision was placed upon the ground that the United States was a government with delegated powers only. That therefore the Courts of the United States could exercise only such powers as could be shown to have been delegated to the United States and assumed by it. That while the United States might have the power to declare many acts to be crimes, yet unless it had done so, it was not within the power of the Courts so to do, since such action would be legislative and not judicial in character.

The indictment was for libel upon the President and Congress.

United States *vs.* Coolidge, 1 Wheat. 315.
United States *vs.* Bevans, 3 Wheat. 336.
State of Pennsyluania *vs.* Wheeling, etc., Bridge Co., 13 How. 518.

At 563 McLean, *J.* says:

"It is admitted that the Federal Courts have no jurisdiction of common law offences, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction."

In *United States* vs. *Lancaster*, 2 McLean, 431, 433, McLean, *J.* says:

"The Federal Government has no jurisdiction of offences at common law. Even in civil cases the Federal Government follows the rule of the common law as adopted by the States respectively. It can exercise no criminal jurisdiction which is not given by Statute, nor punish any act criminally, except as the Statute provides."

In *United States* vs. *Barney*, 5 Blatch. 294, 296, Shipman, *J.* says:

"It is now settled law universally acted on by those Courts [viz: of the United States] that they cannot resort to the common law as a source of criminal jurisdiction. However that body of jurisprudence may furnish the Federal Courts with rules of procedure, definition and construction, those tribunals have no power to try any offences except such as are in some form, prohibited by the Constitution or by act of Congress."

United States *v.* Hall, 98 U. S. 343.
United States *v.* B. & H. County Ferry Co., 21 Fed. Rep., 331, 334.
United States *v.* Barney, 5 Blatch., 294.

It is quite clear moreover that it would not be within the *power* of Congress to make the acts here in question penal. In all the cases cited above, the acts complained of were in fact though not in law offences against the United States Government, and even in such cases it was held that the United States Courts had no jurisdiction, since the acts had not been declared criminal and a punishment affixed by the Constitution or by Congress.

The power of Congress to declare acts penal is considered in

United States *vs.* Hall, 98 U. S.. 343, 345.

Again, there is a distinction to be taken between the privileges and immunities belonging to citizens of the States and of the

United States respectively, which is forcibly drawn by this Court in

Slaughter House Cases, 16 Wall, 36.
United States *vs.* Cruikshank, 92 U. S. 542.

After the same analogy there are offences against the United States and offences against the States, and it is left to the Courts of that sovereignty against which the act is an offence, to prescribe and inflict the punishment.

Ex parte Siebold, 100 U. S. 371.
Fox *vs.* State of Ohio, 5 How. 410.
United States *vs.* Marigold, 9 How. 560, 569.
Moore *v.* State of Illinois, 14 How. 13.

The principle upon which the above cases are decided is a broad one, and applies with great force to the attempt to enforce by civil suit a penalty imposed by a State statute.

The Federal Government is recognized as a sovereign, distinct from any State, and of limited powers. It is not within the province of the Courts of one sovereign to enforce the penal laws of another. A statute operates *propriore vigore* only so far as the will of the sovereign enacting it can be made effectual, viz., within the limits of its own jurisdiction. It lies entirely within the discretion of any other sovereign as to how far such statute shall be enforced within its jurisdiction. The Courts of any sovereign, in determining what effect shall be given to the statutes of another sovereign, simply follow the expressed or presumed will of their own sovereign. The Federal Government being, as has been seen, an independent sovereign, its Courts must look to it to determine what force they shall give to State statutes. The decisions which have been cited show conclusively that it is not the will of this sovereign that its Courts should exercise any jurisdiction to enforce penalties not so declared by its own laws.

The sense of the legislative department upon the question is shown by the fact that the jurisdiction of the Circuit Courts on the ground of citizenship has always been limited to "suits of a civil nature."

U. S. Rev. St. §6, 29.
Wheeler *vs.* Bates, 6 Bliss, 88.

Although the same words are not found in the Constitution, it is submitted that the term "controversies" in Art. III, § 2, of the Constitution under which jurisdiction is here claimed, cannot reasonably be held to include suits to recover statute penalties. In the first two clauses of the section cited the word "cases" is used. The change of word in the later clauses shows that a different meaning was intended. The former word would evidently include criminal "cases," but to speak of criminal "controversies" would be an anomaly. But a suit to enforce a Statute penalty is in substance simply a criminal prosecution. The remedy might properly have been by indictment. It is not a penalty resting upon agreement, but one imposed by the will of a sovereign for a violation of its command as expressed in the Statute. But the point has been practically settled by this Court, which has several times stated the law to be, that the United States Courts will not enforce the penal laws of a State outside the limits of such State.

Flash *vs.* Conn. 109 U. S. 371.

This was a case originally brought in a Florida State Court and removed to the United States Circuit Court for the Northern District of Florida. The case came before this Court upon a writ of error. It was an attempt to enforce against stockholders a liability created by a New York Statute. The question whether the statute was or was not of a penal nature was recognized by the Court as a vital point.

At p. 376–7, Wood, *J.* for the Court says:

> "It is well settled, and is not denied by plaintiff's counsel, that the penal laws of one State can have no operation in another. They are strictly local and affect nothing more than they can reach." * * "Upon this branch of the case, therefore, the question is whether the individual liability * * is in the nature of a penalty, or whether it is * * based on a contract between the stockholders and the creditors of the Company."

The Court thus clearly recognize that if the statute had been of a penal nature it could not have been enforced in the United States Courts in Florida.

See also Dennick *vs.* Railroad Co., 103 U. S., 11, 17.

In this case the distinction between a statute giving a substantive right and one of a penal nature is clearly drawn. The Court held the statute there in question not penal, on the ground that it was "a civil action to recover damages for a civil injury."

It is the substance and not the form that must be looked at. Hence it is that no distinction has ever been made in the refusal of Courts to allow the penal laws of one country to be enforced in another between cases where the procedure is by indictment and where it is in form by a suit.

Whart. Confl. of Laws.
Flash *vs.* Conn. 109, U. S. 371.
First Nat'l Bank *vs.* Price, 33 Md. 487.
Gale *vs.* Eastman, 7 Met. 14.
Halsey *vs.* M'Lean, 12 Allen, 438.
Lindsay *vs.* Hill, 66 Me. 212.
Slack *vs.* Gibbs, 14 Vt. 357.
Bird *vs.* Hayden, 1 Robt. (N. Y.) 383.

In *Derrickson* vs. *Smith*, 27 N. J. L. 166, where the question arose upon a demurrer to an action at law brought in New Jersey to enforce the statute liability of the trustees of a New York corporation, because of the failure of the trustees to file a certificate required by the New York Statute, the Court says :

> "His [the defendant's] liability results from the failure of the trustees to comply with the requirements of the statute. It is, in fact, a penalty inflicted upon the trustees for a failure to perform a duty enjoined by the statute. It is immaterial whether that penalty be a specified sum or the payment of the debts of the corporation."

See also Halsey *vs.* McLean *ubi supra.*

The sole inquiry ever made is whether the statute is in substance penal. No matter what may be the form of the remedy

provided or under what disguises the real character of the law may be hidden, if it is found on examination to be really penal in character, it will not be enforced in any other jurisdiction.

Lord Loughborough in *Folliott vs. Ogden*, 1 H. Bl. 135 says: "Penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be siezed by virtue of their authority."

Scoville *vs.* Canfield, 14 Johns. 338.
W. T. & C. Co. *vs.* Kilderhouse, 87 N. Y. 430.

The reason of this rule is found in the nature of a penal statute. Such a statute does not give a substantive right to any subject which may be enforced anywhere. It is simply a mandate from the sovereign to the Courts to punish certain acts. Such a mandate can be directed only to its own Courts.

See Lemmon *vs.* The People, 20 N. Y., 562.
Yeaton *vs.* United States, 5 Cranch, 281.

Each sovereign will punish and punish only such acts as it has declared to be offences against itself.

The acts here complained of are not offences against the United States, but against the State of Alabama. The Courts of the United States have therefore no jurisdiction to punish them.

Whenever the Federal Courts enforce a State Statute, it is upon the ground that such statute establishes "a general rule as to property, or personal rights, or injuries to either."

Railway Company *vs.* Whitton, 13 Wall. 270, 286.

But the statute in question establishes neither.

Holmes *vs.* O. & C. R'y Co., 5 Fed. Rep. 75.
The John Fanon, 14 Blatchford, 24.

2. The present case, however, does not necessarily call for a decision of the broad question already stated. For if it be assumed that a United States Court sitting in Alabama would enforce the

penalty against citizens of that State if the question could properly come before it, it is quite clear that a United States Court sitting in any other State in which, as we have seen, the penalty would not be enforced, would not itself enforce it.

But the Supreme Court, sitting in the exercise of its original jurisdiction, is to be considered as sitting in the State where the defendants are found, and not within the jurisdiction of the plaintiff State, whenever this question becomes material.

a. A United States Court sitting within a State has in general only two guides for action: *first*, the Federal laws; and *second*, the laws of the State within which it is sitting.

Section 721 of the Revised Statutes of the United States provides that

> "The laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

Jurisdiction having attached, a case is tried in the Federal Courts "upon the same principles, and its determination is governed by the same consideration as if it had been brought in the proper State tribunal of the same loeality."

Ex parte McNiel, 13 Wall. 236, 243.

Speaking of the effect to be given to rules of evidence of a State in a trial in a United States Court in the recent case of *Chase vs. Curtis*, 113 U. S. 452, 460, Matthews, *J.* says:

> "It is not true that the Courts of the United States, in a special statutory proceeding would give to a judgment of a State Court any other or greater effect, either as a matter of evidence or a ground of action, than must be lawfully given to it in the Courts of the State, whose laws are invoked to enforce it."

While the United States Court will not in all cases follow the law of any one State, yet where the question at issue affects the sovereignty of the State where it is sitting, as in this case, it is

peculiarly fitting that it should do so. It is the province of the State, except so far as it has delegated the power to the United States, to determine what acts shall be regarded and punished as penal within its borders. It would be an affront to the sovereignty of a State if the Federal Court in that State should punish the citizens thereof for acts which are an offence against neither the laws thereof nor of the United States.

It has been frequently held that the State Courts have no jurisdiction to enforce the penal laws of the United States, on the ground that the "government of the United States stands in the same relation to the State governments as any foreign government."

United States *vs.* Lathrop, 17 Johns., 4.
Ely *vs.* Peck, 7 Conn., 239.
Jackson *vs.* Rose, 2 Va. cases, 34.
Missouri Riv. Tel. Co. *vs.* Bank, 74 Ill., 217.

In *Jackson* vs. *Rose* (*ubi supra*), it is said by the Court at p. 37, "that its (the United States) sovereignty is as entirely separate and distinct from the sovereignty of the respective States, as the sovereignty of one of those States is separate and distinct from the other."

See Martin *vs.* Hunter's Lessees, 1 Wheat., 304, 330.

This Court is to be considered as sitting with reference to the various defendants as if sitting in the States of which they are residents respectively or where they are found and process served upon them.

Upon this point the case of *State of Pennslvania* v. *The Wheeling, &c., Bridge Co.*, 13 How. 518, would seem conclusive. This was a bill in equity appealing to the original jurisdiction of the Supreme Court for the purpose of abating a nuisance. The nuisance complained of was a bridge over the Ohio river at Wheeling, Virginia, and the defendants were the company building it, and were located at Wheeling. At p. 563, M'Lean, *J.*, delivering the opinion of the Court, says :—

> "And it is admitted that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia."

At p. 579, Taney. *C. J.* says: —

> "In examining this question, it must be borne in mind that, although the suit is brought in this Court, the law of the case and the rights of the parties are the same as if it had been brought in the Circuit Court of Virginia, in which the bridge is situated. Pennsylvania, as a State, has the right to sue in this Court. But a suit here merely changes the forum, and does not change the law of the case or the rights of the parties. * * * And the Court is bound to administer to the State here the same law that would be administered to an individual suitor, suing for a like cause, in a Circuit Court of the United States, sitting in the State where the bridge is erected."

If such a suit as this were brought by an individual in the Circuit Court, it could only be brought in some district where the defendants could be found.

18 U. S. Stat. 470.
Boston Electric Co. *vs.* Electric Gas Lighting Co., 23 Fed. Rep. 603, and cases cited.

That would presumably be in the district where the defendants severally were found and served in this case or in the district where they are citizens.

In § 1 of the Act of March 3, 1875, respecting the jurisdiction of Circuit and District Courts of the United States, there is the following provision: —

"And no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided."

The exceptions have no bearing upon the point under consideration.

It is evident from this provision that the Court should be considered as sitting in the place where alone the United States Circuit Court would have jurisdiction of the parties joined as defendants in the cause.

In either view the suit would have to be brought outside of Alabama. It follows that this Court must for the purposes of this case be considered as sitting outside of that State, and in fact it

seems clear that it must be considered as to the respective defendants as sitting in the State in which they were found by its service. The essential point in jurisdiction is to have under control the defendants or the subject matter. The plaintiffs come into Court voluntarily and submit themselves to its jurisdiction. The defendants are brought in *in invitum* and strictly under the power of the Court. The plaintiff must follow the defendant and sue where he can find him, and must submit to the law of the place where the defendant is found and rely upon it to recognize the foreign law to the proper extent. Suing in the Supreme Court gives the State no added right. The forum is changed but the case is to be decided exactly as though the suit was brought in the Circuit Court for the proper district.

But, as has been seen, if the suit had been thus brought, the defendants could not be held liable. Hence they cannot here.

The defendants are alleged to be, respectively, citizens of Massachusetts, New York and New Jersey. In all these States it has been expressly decided that a statutory liability of the nature of that which the plaintiff here seeks to enforce is penal and will not be enforced out of the jurisdiction of the State creating the liability.

Halsey *vs.* McLean, 12 All. (Mass.) 438.
Bird *vs.* Hayden, 1 Robt. (N. Y.) 383.
Derrickson *vs.* Smith, 27 N. J. L. 166.

III.

THE PLAINTIFF HAS JOINED DIFFERENT AND DISTINCT CAUSES OF ACTION NOT PROPERLY UNITED IN THE SAME SUIT.

a. This is plain and requires no argument if the Court shall be of opinion that the statute of February 11, 1870, contemplates a different sort of remedy from that contemplated by the earlier statute of February 19, 1867.

b. And if the Court shall hold, as we think it must, that the same sort of remedy and the same mode of enforcing the liability is contemplated by both statutes, it will still be maintained that

the plaintiff has joined in her declaration causes of action which are not proper to be joined.

Thus in the Act of February 19, 1867, there is no provision for the liability of the "officers" of the corporation, but only of the *stockholders*, while in the Act of February 11, 1870, the "directors or other officers," as well as the "stockholders and incorporators," are made liable.

Act of February 19, 1867, § 6.
Act of February 11, 1870, § 1 *ad. fin.*

The plaintiff does not state in what capacity he sued the defendants, or any of them, for the different acts alleged, but it is to be observed that one of the allegations of the declaration is that the corporation "wrongfully, illegally, fraudulently and knowingly *permitted* the *defendants* to appropriate to their own use and the use of their accomplices" certain moneys (Declaration, p. 19).

This is obviously an allegation of a different nature from those which charge the *defendants* with *permitting* or not objecting to the *frauds* of the *Company*, and it is submitted that no provision is made in either of the statutes for the liability of the stockholders for frauds committed by them to which the corporation is not a party, whether done with the permission of the corporation or otherwise. There is no allegation that the corporation participated in the alleged frauds now under consideration. The statute makes the stockholders liable only in case of frauds of the Company for loss occurring by such frauds. Permitting the stockholders or officers to do wrong is not made a fraud by the statute. The statute is penal and will be construed strictly.

Chase *v.* Curtis, 113 U. S. 452.

If the defendants are liable at all for such acts, it is to the assignee in bankruptcy, in a different form of action. They are liable to the State only for violation of the Acts, and the Acts impose duties only on the Company, not on the stockholders or officers, the violations of which are to create a personal liability.

The same remarks apply to the allegation on p. 20 of the declaration, to the effect that in January and February, 1870, the Com-

pany "*permitted*" the defendants "to misappropriate and convert to improper uses" certain proceeds of the endorsed bonds, and to the allegation on page 22 of the declaration, that said Company, during the years 1869 and 1870, "*permitted* the defendants respectively to use a large amount of said endorsed bonds or the proceeds thereof * * * in purchasing for themselves *respectively*" stock in corporations, and in other ways alleged to be unlawful.

In this connection the word "*respectively*," used twice in the allegation above quoted, is significant, as showing that the wrongs there complained of do not come within the prohibitions of the statutes.

The plaintiff cannot recover in the same action for wrongs done by the defendants in different capacities.

Thus it was held that a bill charging an illegal vote of directors of a corporation and an illegal payment of money in dividends in pursuance thereof, and also charging fraud and embezzlement against the treasurer of the corporation, was multifarious.

Winsor *v.* Bailey, 55 N. H. 218.
Pope *v.* Leonard, 115 Mass., 286.

And in *Wiles vs. Suydam*, 64 N. Y. 173, which was a complaint seeking, and setting forth sufficient facts, to charge the defendant as stockholder of a corporation for a debt of the corporation because of failure of the trustees to make and record the certificate that the capital was paid in, under a section of the statute making stockholders liable until such certificate was filed and also seeking and alleging sufficient facts, to charge him as trustee for neglect to file the annual report required by another section of the same statute, which made the trustees liable for the debts of the corporation. The Court sustained a demurrer on the ground that the causes of action were improperly united.

Church, *C. J.*, says on p. 176:

> "The recovery of the debt is the object of the action, but a cause of action must have two factors, the right of the plaintiff and the wrong or obligation of the defendant. These must concur to give a cause of action. * * * * The object of the action is the same, viz: the collection of the debt, but the liability and the grounds of it are entirely distinct and unlike. That there are two causes of action in this complaint seems too clear to require much argument."

And at p. 178 he says: —

> "The nature of the two actions is essentially different, although the object to be obtained is the same. The facts to establish the liability are entirely unlike. *The measure of liability is different; the defenses are different.*

The same is true of the case now before the Court. If the defendants fraudulently misappropriated bonds or proceeds thereof whether with the consent of the corporation or not, the cause of action against them is for their actual wrong doing and fraud, and they would be liable, not because the company had committed fraud with their knowledge, but because they themselves had been guilty of fraud. The measure of their liability would be, with respect to each, the whole amount which he had misappropriated, regardless of any question of loss. But the statutes make them liable only for permitting, without objection, the company to commit fraud or violation of the statutes, and only to the extent of the *losses* to the State in consequence of such frauds. Surely, then, "the measure of liability is entirely different," as well as the nature of the offence.

And even though it should be argued that the Statute of February 11, 1870, making the "directors or other officers and incorporators and stockholders * * who shall knowingly *violate* either of said Statutes," liable for the loss incurred, refers to frauds by the officers and stockholders themselves, it should be noted that the only commands and prohibitions in the statute are directed to the Company, so that the "violations" by the officers and stockholders would necessarily be in permitting violations by the Company.

Moreover, it is plain that as to certain wrongs complained of in the declaration, if done at all by the defendants, they were done by them as directors or officers, while others might relate to them only as stockholders.

IV.

THERE IS A DEFECT IN THE PERSONS JOINED AS PARTIES DEFENDANT IN SAID SUIT.

This appears upon the face of the declaration and the statutes which are made part of it.

a. The corporation should have been made a party defendant.

b. All the stockholders of the corporation should have been joined as parties defendant:

1. Because it was the evident intent of the statute that all the stockholders should be made parties, leaving those who could, to show to the *Court* that they came within the exception to the liability.

2. Because the liability imposed is not several.

3. Because the penalty is single and to be enforced by a joint action, judgment being rendered only against those who do not show their innocence to the Court.

a. The corporation should have been made a party defendant.

(1) Under the statutes it is only the acts of the *Corporation* that can be complained of.

The Court must adjudicate that the *Corporation* has committed fraudulent acts in order to hold the defendants. This it clearly will not do unless the Corporation is before it. The case is much stronger for having the Corporation a party, than in the case of statutory liability of stockholders for the ordinary debts of the Corporation. Yet even there the corporation is a necessary party.

Lyman *v.* Bonney, 101 Mass. 562.
Deerfield *v.* Nims, 110 *id.* 115.
Wood *v.* Dummer, 3 Ma. 308, 315–16.
Kinsley *v.* Rice, 10 Gray, 325.
Harris *v.* First Parish, 23 Pick. 112.

The same rule was held to apply in a case almost identical with the case at bar.

Johnson *v.* Churchwell, 1 Head 146.

By the charter of the Bank of East Tennessee it was provided that directors who might sanction certain specified violations of

the charter should be liable in their individual property for any loss or damage thereby, to the creditors of the bank.

The bill was by a judgment creditor against the directors. The corporation was not made a party. *Held*, that there were two essential prerequisites to charge the directors personally: (1) That the violations of the charter should be established by a direct proceeding against the corporation; (2) That the corporate assets shall have been exhausted.

The Court say; "It is clear that inasmuch as the fact of such violations of the charter constitutes the only ground for holding the directors personally responsible, there can exist no right or cause of proceeding against them until the violation of the charter shall have been previously established against the corporation."

Approved in Thompson on Liability of Officers and Stockholders, p. 462–3, as supporting the general rule above stated.

In this case, as in *Johnson* vs. *Churchwell*,

(1) The defendants' liability is clearly *secondary* that of the Company, for its own fraudulent acts being *primary*. The primary liability must clearly be judicially established before the secondary can come into operation, and this can only be done with the party primarily liable, a party to the record.

(2) The defendants have the right to have it judicially determined in a suit between proper parties, that the Company is unable to meet its primary liability. The defendants are liable only for the "loss" due to fraudulent acts of the Company of which they had knowledge. This clearly means the *net loss* after the corporation has been pursued so far as it can be. Whether the corporation has been thus pursued is a question that cannot be determined without having the corporation before the Court.

In the Tennessee Bond Cases, 114 U. S. 663 at 702, Mr. Chief Justice Waite referring to the 13th section of the Tennessee Internal Improvement Act which is *verbatim* the same as the 6th section of the act of February 19, 1867, now under consideration, says that the remedy given to the State in case of frauds was "*against the company and its implicated stockholders.*"

And this is obviously the intent and meaning of the statute.

It is certain, therefore, that the action contemplated in the Act of February 19, 1867, § 6, was an action against the *corporation*

and its stockholders, and if, as we have already remarked, the statute of February 11, 1870, contemplated a liability of a different nature or to be enforced in a different way, it is a misjoinder of causes of action to attempt to recover for violations of both, in the same suit.

It is not enough that the declaration alleges that the Company was petitioned into bankruptcy and its property and assets sold.

Coburn *v.* Boston Papier Maché Mfg. Company, 10 Gray, 243.
Morawetz, Private Corporations, § 636.

Shaw, *C. J.*, in the case in 10 Gray (cited *supra*), which was a suit by a creditor of a corporation which had been duly adjudicated insolvent and its affairs placed in the hands of assignees, who had paid a dividend, which the plaintiff creditor had received, says : —

> "The corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all their debts, and then no impediment would exist before a surrender pursuant to law, or a forfeiture ascertained and declared by a proper judicial proceeding, from resuming their business. Or, if their capital is impaired, or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital, and then proceeding to use their corporate powers."

Nor will the charter of a corporation "expire by reason of acts of omission or commission on the part of a company constituting a sufficient ground for declaring a forfeiture; but the franchises continue in full force until the forfeiture is claimed by the State granting them; and this can be done only in a proper legal proceeding, by which the cause of forfeiture is ascertained and a dissolution adjudged."

Morawetz Priv. Corp. § 654 and cases.

The insolvency law of Massachusetts is like the United States Bankrupt Law of 1837 in its provisions as to the proceedings against corporations; in neither is a discharge granted either to the corporation or its officers or members.

"The appointment of a receiver to take and distribute among the creditors and stockholders all the property of a corporation, may, with sufficient accuracy, be called as it was by Chancellor Walworth in *Verplanck* vs. *Mercantile Insurance Co.*, 2 Paige 452, and *Bank Commissioners* vs. *Bank of Buffalo*, 6 Paige 503, 'a virtual dissolution of the corporation,' but it does not extinguish its franchise, terminate its legal existence, or render it incapable of being sued at law or in equity," per Mr. Justice Gray in *Folger* vs. *Columbian Insurance Co. and Trustee*, 99 Mass. 267 at 276.

Affirmed by Gray, *C. J.*, in *Chamberlin vs. Huguenot Mfg. Co.*, 118 Mass. 532 at 536, which was a case of the bankruptcy of a corporation under the United States law, where it was said by Chief Justice Gray:

> "Its officers and stockholders could not be charged with its debts, without a judgment against the Corporation, and a demand and return upon the execution, in strict compliance with Statute 1862, c. 218, § 3, re-enacted in Statute 1870, c. 224, §§ 40, 42."
>
> "*The bankruptcy of the corporation and the proof of the plaintiff's claim against its estate did not dissolve the corporation.*"

Upon this point the case of *Priest* vs. *Essex Hat Mfg Co.*, 115 Mass., 380, has a direct bearing. This was a bill in equity in behalf of the plaintiff and all other creditors of the defendant corporation, against the corporation and its officers, to enforce the statutory liability of such officers for the debts of the corporation, by reason of their failure to comply with the requirements of the Statute. The statute creating the liability provided that judgment should first be obtained against the corporation, and demand made and neglect for thirty days thereafter to pay the execution or show property sufficient therefor and return of the execution unsatisfied. Wells, *J.* after saying that the allegations show that the plaintiff did not wait thirty days after the first demand on execution before the execution was returned unsatisfied, says:

> "We think this is a step in the process which must be taken by formal proceedings, and cannot be supplied by *proof*, that the corporation neglected to pay the debt, made no attempt to exhibit property, and *had none* to exhibit. The omission cannot be regarded as immaterial because it does not affect the equity of the case. The liability does not rest upon equity, but is of strict statute imposition."

In the Act of February 19, 1867, a portion of the remedy provided for the State by section 6, is a decree of sale of the "*road lying in the State*, with all the property and assets of said company, *or a sufficiency thereof*" in case of proof of the frauds or violations alleged, which plainly contemplates the further existence of the corporation, though without the privileges granted by that act.

It follows *a fortiori* that the State cannot be relieved of the necessity of following the direction of the statute to bring its suit against the corporation by her own acts or neglect.

It appears by the declaration (p. 16) that the plaintiff herself became the purchaser of the road at the sale under bankruptcy proceedings on April 22, 1872, the petition in bankruptcy having been filed September 15, 1871.

Section 8 of the Act of February 19, 1867, directs that the company shall

> "Deposit with the Comptroller of the State of Alabama at least fifteen days before the interest becomes due from time to time, upon said bonds endorsed as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for."

And in case of the company's failure to do so,

> "It shall be the duty of the Comptroller to report that fact to the Governor, and the *Governor may immediately appoint* some suitable person or persons, at the expense of the Company, to take possession and control of said railroad and all the assets thereof, and manage the same."

It also provides for the giving bonds by the person or persons so appointed, and for the getting possession of the road and assets, if the Company shall refuse to surrender them, and for the running and management of the road till enough has been received to pay and discharge the interest due on said bonds, and thereafter the return of the road and assets to the Company; and authorizes the comptroller to pay from the treasury of the State the interest on said bonds, not provided for by the Company.

The declaration alleges (pages 22 and 23) that the corporation failed to pay the interest, which became due on the said endorsed bonds on January 1, 1871, and on July 1, 1871, respectively, the first default being nine months, and the last three months, before the filing of the petition in bankruptcy against the corporation. There is no allegation that the State did take possession of the road, as provided in said Section 8. It does not, therefore, appear that if the State had availed herself of the right to take possession of the road, as provided in the Statute, there would have been any necessity for proceeding in bankruptcy. She cannot now set up as a reason for not following, strictly, the course and manner of remedy directed in Section 6, a fact resulting from her own neglect or inaction.

Section 7 made the endorsement a lien upon the portions of the road for which it was made, which accrued to the State "*by virtue of*" the endorsement "without a deed from the Company."

Therefore, if the sale in bankruptcy of the corporation was "a virtual dissolution," it was not a dissolution such that the State can plead it, as a reason for not making the corporation a party to the suit to enforce the liability of the officers and stockholders.

Nor did the decree of sale of the road, alleged to have been passed January 3, 1884 (Declaration, pp. 16 and 17), dissolve or contemplate the dissolution of the corporation. The language alleged is that the sale should be "a perpetual bar both in law and equity, against said corporation, and the said corporation should be forever foreclosed from all equity of redemption in said premises." This clearly contemplates the further existence of the corporation.

b. All the stockholders should have been joined.

Section 6 of the Act of Feb. 19, 1867, evidently contemplates a suit against all the stockholders jointly, reserving a right to each stockholder to escape liability by showing that he did not permit, nor was cognizant of, the fraudulent acts complained of. The language is, "the stockholders thereof shall be individually liable."

In *Horner* vs. *Henning*, 93, U. S., 228, the language was "the trustees of such Company assenting thereto shall be personally and individually liable."

At p. 232 Miller, *J.*, says, referring to certain New York decisions: "*But there the liability of the stockholder is several,*" clearly implying that in the case before him it was joint.

That a liability imposed upon a class of persons without any provision that they shall be *severally* liable, creates a joint liability simply, seems very clear.

The language of the Act of February 11, 1870, is very similar to that in *Horner* v. *Henning*, viz.: "The directors or other officers and incorporators and stockholders who shall knowingly violate, &c., shall be held personally liable to the State for any loss incurred thereby."

This clearly contemplates a joint liability simply, since not even the word "individually" (which alone, however, is not sufficient to create a several liability) is used.

That all the parties defendant to a joint obligation must be joined is familiar law.

The necessity of such joinder as a matter of justice is stated in

Adler *vs.* Milwaukee Patent Brick Mfg. Co. *et als.*, 13 Wis. 57.

This was a bill to enforce unpaid subscription of stockholders. Dixon, *C. J.*, says at p. 62:

> "The authorities show that in such actions, unless it be impossible or impracticable, all the stockholders must be made parties. This is required in order to enable the Court to do complete justice between the stockholders themselves, and so that no one of them may be compelled to pay more than his due proportion, and that all alike may be obliged, according to the number of their respective shares, and their pecuniary ability to contribute toward the losses which the Company may have sustained. For it would be manifestly wrong and unjust to allow the creditors to select one or more of the stockholders and compel them to submit to burdens from which the other shareholders, though equally bound, are exonorated. Hence the shareholding defendants have the right, unless some good reason for the omission be shown, to insist on all other shareholders being parties also."

In the case at bar exoneration from liability is not given to such stockholders as were ignorant of or opposed the perpetration of the frauds by the company, but to such stockholders "as may show to *said Court*" their ignorance of or opposition to the perpetration of such frauds. Clearly by "*said Court*" the Court in which the proceedings were to be taken against the corporation was intended, and of course it would be impossible for the stockholders to show their innocence to the Court unless before it, as parties to the proceeding.

And the words of the provision are by no means a mere accident or matter of form. It was a wise provision of the legislature in order that guilty stockholders might not, by collusion or other unlawful means, procure themselves to be omitted from the suit, leaving their comrades to bear the entire burden. It evidently seemed to the legislature the wiser and more equitable course to bring all the stockholders into Court, and then let those who could show their innocence do so, leaving all the guilty to suffer the penalty of their guilt. Otherwise the most guilty might escape, the least guilty suffer the entire punishment.

In the same direction is the absence of any words in the statute creating a *several* liability.

It will not be contended that the penalty inflicted by the statute is *several*. Obviously the State could recover her loss only once, and not from each of the guilty stockholders, if more than one. The absurdity of such a contention is its refutation.

The basis of the penalty is *loss* to the State. Fraud which results in no loss creates no liability to punishment under the statute. Violations of the Acts, whether fraudulent or not, if they result in *loss* to the State, are made punishable to the same extent by the statute of February 11, 1870.

The penalty is therefore single, and when the State has once been compensated for her loss, no matter how many stockholders are guilty by reason of their knowledge and permission of the Company's frauds, the State can recover no more.

"The rule is that where the offence is in its nature single, and cannot be severed, there the penalty shall be single; because though several persons join in committing it, it still constitutes but one offence."

Sedgwick Const. and Stat. Law (2 ed.), p. 79, and cases.

In *Palmer* v. *Conly et al.*, 4 Denio, 374, which was an action to recover a penalty under a statute, for knowingly assisting a lessee to remove goods from the lessor's premises, leaving rent due thereon, for the purpose of avoiding payment of the rent due, it was held that a joint action was proper, and Jewett, *J.*, says:—

"A better criterion [than the nature of the offence] perhaps is the apparent intention of the legislature to be collected from the Statute upon which

the prosecution is founded, which was the principle acted upon in *Partridge* vs. *Naylor* (Cro. Eliz. 380). There the action was upon a penal statute against three, and though the words of the Act were 'Every person offending shall for every offence forfeit, etc.' yet *the action being given only to the party injured by the offence*, it was adjudged that only one penalty was incurred, it being obviously intended by the legislature rather as a satisfaction to the party aggrieved than as a punishment of the offender. I take it to be clear that when a Statute creating an offence shows by its terms an intention in the legislature to inflict but a single penalty (as where it was given by way of compensation to the individual injured by the offence, or when the language of the Act makes it single), there is a plain positive ground of exception to the general rule" [that penalties are several].

Warren *vs.* Doolittle, 5 Cow. 678 acc.

In the above cases a joint action was held to be the proper one.

The object of the State was plainly to secure herself against a loss, by reason of fraudulent acts of the Company, as well as the punishment of the stockholders or officers who might knowingly permit such frauds, and as a precaution for herself as well as a matter of justice to all, the legislature intended to have all the stockholders, guilty and innocent, before the Court which was to determine who were innocent and who guilty, and the guilty were to contribute to a fund to meet the loss which the State should prove had been incurred by reason of the Company's frauds.

In such a suit it would of course be necessary to show the perpetration of what frauds each stockholder or officer had knowingly permitted, and what loss resulted from each fraudulent act.

It has already been argued at length that equity is the only proper tribunal for such a determination. This becomes even more apparent when it is considered that in suits at law as well as in equity all the stockholders must be joined, both because of the words of the statute and the nature of the penalty.

To quote once more from Mr. Justice Miller's language in *Hornor* vs. *Henning* (*supra*):

"The remedy for this violation of duty as trustees is in its nature appropriate to a Court of Chancery. The powers and instrumentalities of that Court enable it to ascertain the excess of indebtedness over the capital stock, the amount of this which each trustee assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts."

See Taylor on Corporations, §§ 725, 726 and 775.

Moreover in the declaration in this case there is not even an allegation that the defendants are all the stockholders or officers known to the plaintiff to be guilty of knowingly permitting or participating in the wrongs complained of, but on the contrary it several times uses the language the "defendants and their accomplices," and on page 19 of the declaration the allegation is of a fraudulent issue of *stock* of the corporation "to the defendants and their accomplices," and on page 8 that the defendants were the "*majority*" of the incorporators, officers, directors and stockholders.

It is submitted that these allegations are fatal to the maintenance of the action in its present form.

V.

IT APPEARS THAT THIS COURT HAS NO JURISDICTION IN THE PREMISES.

a. For the reasons stated in Points I and II *supra.*

b. Because the word "controversies," used in the Article III, § 2 of the Constitution of the United States, under which this Court must derive its jurisdiction, if it has any, in this case, does not include suits to enforce penal statutes.

c. Because it appears from the declaration that the corporation is a party in interest to the suit, and should have been made a party to the record, and the corporation is a citizen of the plaintiff State.

Revised Statutes, § 687, provides: —

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

If Congress has the power to limit the original jurisdiction of the Supreme Court, this act clearly does limit it to "controversies *of a civil nature,*" even though the Constitution were capable of

a broader construction. Granting a certain jurisdiction negatives all other.

United States *vs.* More, 3 Cranch, 159.

If Congress has no such power, the act is to be considered simply declaratory of the understanding of Congress as to the true meaning of the Constitution. The act has been frequently quoted by this Court, and it is believed always regarded as correctly expressing the extent of the jurisdiction of this Court.

That a suit to enforce a penalty is of a *criminal*, and not of a *civil*, nature, has been already argued.

The decisions that such suits will not be sustained out of the State which passed the act, are in point.

c. The corporation should have been joined as a party defendant and the Corporation is a citizen of the plaintiff State.

It has long been too well settled to require citation or argument that for jurisdictional purposes a corporation is a *citizen* of the State that created it.

Therefore, if the Corporation were a party defendant, this Court would have no jurisdiction in this case.

U. S. Rev. Stats., § 687.
Steamship Company *vs.* Tugman, 106 U. S. 118.

And it is clear that the Court cannot take jurisdiction when it appears that if a party in interest were before it, its jurisdiction would be ousted.

Chicago & N. W. R. R. Co. *vs.* Crane, 113 U. S. 424.

That the corporation is a party really in interest seems clear when it is considered that it is the frauds of the *corporation* that are to be proved, as a foundation for the defendants' liability.

It is submitted that on the ground of interest the corporation is within the rule laid down by this Court as to the indispensable parties to a suit, namely, that they are

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Shields *vs.* Brown, 17 How. 130.
Barney *vs.* Baltimore City, 6 Wall 280.

We have already argued and, as we think, have shown that the corporation is a necessary party. It follows that this suit is not a controversy between a "State and citizens of another State," and therefore not within the original jurisdiction of this Court.

It is also to be borne in mind that there is no allegation of any contract, or of any thing in the nature of contract with respect to the defendants, or any of them. All the allegations are of violations of the provisions of the Statutes.

It will be observed that the argument has been based upon the assumption that the Act of February 19, 1867, in its provisions as to violations of the Act and personal liability, applies in all particulars to the Alabama & Chattanooga Railroad Company and its stockholders.

But this is by no means certain, and it is claimed that its provisions in that respect were materially "*modified and changed*" by the Act of November 19, 1868, and that the declaration does not set forth any cause of action against these defendants, so far as it alleges violations of the provisions of that Act, with respect to the misapplication or sale of endorsed bonds.

It appears by the declaration, as well as by the various acts made a part thereof, that the Alabama & Chattanooga Railroad Company was not the result of a consolidation of the Wills Valley Railroad Company and the Northeast & Southwest Alabama Railroad Company, authorized and provided for by the Act of October 6, 1868 (Declaration p. 24), nor is it alleged that any action has accrued to the State by reason of such statute (Declaration p. 23).

The Alabama & Chattanooga Railroad Company was the result of the purchase of the Northeast & Southwest Alabama Railroad Company by the Wills Valley Railroad Company, authorized and provided for by the statute of November 17, 1868 (Declaration p. 41), one of the provisions of which is —

> "That the general laws on the subject of the endorsement of Railroad bonds by the State shall apply to the endorsement of the bonds herein authorized, except in so far as the same may be modified or changed." (Act November 17, 1868, § 7, *ad fin.*)

We submit that the Act of February 19, 1867, was modified and changed in this very respect of the violations of that Act and the personal liability of the stockholders.

The Act of February 19, 1867, was a general act, under which any corporation might obtain endorsement, and in the nature of things the State could know nothing of the character of the corporations, or their stockholders, and so took stringent means to protect herself against loss.

But the Act of November 17, 1868, was of an entirely different nature. The legislature had before it the parties for whom it was legislating. The act could apply to no other corporation than that resulting from the purchase of the North East and South West Alabama Railroad Company. It, therefore, becomes important to see how far the provisions of the Act of 1867 were modified or changed by the Act of November 17, 1868.

It may be said here that the Act of September 22, 1868, has no bearing upon the question now under consideration. It was, in effect, nothing but an exception to the general law of 1867, made in favor of the Wills Valley Railroad Company, giving it the right of endorsement for the portion of its railroad entirely without the State, upon its agreement that it would complete an extension into the State.

Section 5 of the Act of 1867, has already been quoted in full (*supra*, p. 4), and provides the conditions upon which the Governor is authorized to endorse the bonds — and "that the bonds before specified [endorsed bonds] shall not be used by said Company for any other purpose than the construction and equipment of said road," (i.e., any road availing itself of the privileges of the act,) and requires that the President should make an affidavit, and the directory pass a resolution that such bonds should not be used for other

purposes, and should not be sold for a less sum than ninety cents on the dollar.

But the Alabama & Chattanooga Railroad Company is not left, by the provisions of the Act of November 17, 1868, to obtain the privileges of endorsement under the Act of 1867. On the contrary, an independent provision adapted to that road is made in Section 7 of the Act of November 17, 1868 (Declaration, p. 41), a portion of which section is as follows: —

> "*Provided* that said railroad shall first *guarantee*, to the satisfaction of such governor, the completion and equipment of said road within a reasonable time to be presented by him, and *shall further guarantee*, to the satisfaction of such governor, that the road and bridges shall be of the grade and character known as first class, *and* that no bonds shall be sold for less than ninety cents in the dollar, and that said bonds shall constitute a lien upon the whole road, whether lying in or out of the State."

The governor is to be *guaranteed* under the Act of November 17, 1868. The part of Section 7 quoted is substituted for and takes the place of Section 5 of the Act of 1867. Knowing the road with which it was dealing, the State provides for a guarantee as sufficient protection against loss by reason of the sale of bonds for less than ninety cents on the dollar, while it makes no provision that the stockholders, as such, shall be liable either for the sale of bonds at less than ninety cents on the dollar or for the misapplication of the bonds. This is not mere accident, but arises from the fact stated that one is a general Act, while the other is a special Act, having reference only to one road, and that to a road formed of two already existing roads, at least partly completed and equipped.

In short, the provision of Section 5 of the Act of 1867 as to the use of the endorsed bonds, being inapplicable to the case of a road already completed and equipped, is omitted from the clause substituted for it in the Act of November 17, 1868, and no provision is made prohibiting the sale of bonds at less than ninety cents on the dollar, it being thought sufficient by the Legislature to provide for a guarantee from this particular road to the State, that such sales should not be made, and no liability is placed upon the stockholders for breach of such guaranty.

It follows that the plaintiff has no action against these defendants for the wrongs complained of as violations of the Act of 1867,

prior to February 11, 1870, with respect to misappropriation or sale of the endorsed bonds.

RECAPITULATION.

To summarize briefly it is claimed that:

I. *The plaintiff should have proceeded in equity, because*

a. The Statute of 1867 prescribes that the remedy created by it shall be enforced in equity, and the Statute of 1870 evidently contemplates the same sort of remedy, as it creates the same kind of liability and refers to the preceding Act.

b. To determine the extent of the liability, there must be an accounting to show what if any loss has been actually sustained, and what wrongs each of the defendants knowingly permitted, and the loss resulting from each wrong done, and such a determination cannot well or properly be made in an action at law.

II. *The plaintiff must sue, if at all, in the courts of Alabama, because:*

a. That is the remedy provided in one Statute, and evidently contemplated by the other.

b. The liability is in the nature of a penalty, and will not be enforced outside of the jurisdiction of the power creating it. The United States is a sovereign power, independent of and distinct from the State, in its jurisdiction.

III. *The plaintiff has joined causes of action not properly united in the same suit.*

a. The liability for acts done in different capacities, as for instance stockholders and directors, cannot be enforced in the same action.

IV. *The plaintiff has omitted indispensable parties to the suit.*

a. The Alabama & Chattanooga Railroad Company should have been a party.

1. The statutes, one expressly, the other by implication, provide that the remedy shall be in the State Court.

2. It is the frauds of the Company that are alleged as the basis of the liability.

3. In a suit to enforce a stockholder's or director's statutory liability by reason of violations of the statute, the corporation should always be a party.

b. All the stockholders should have been made parties defendant.

1. The statute of 1867 so intends in providing exoneration from liability only to the stockholders who shall show to the *Court* their innocence.

2. In actions to enforce statutory liability of stockholders or directors, it is essential to join all the stockholders or directors, as the case may be, or show some good reason for not so doing.

3. The liability will not be construed as several unless the statute so provides expressly or by clear implication, which it does not in this case.

4. The penalty is single and can be enforced only against all the stockholders in a joint action, judgment being rendered against those who do not show their innocence.

V. *This Court has no jurisdiction.*

a. For reasons stated in Points I, II and IV.

b. Because the provision of the Constitution vesting jurisdiction in the Supreme Court in "controversies of a civil nature" between a "State and citizens of another State" does not extend to the enforcing by the Supreme Court of the United States, of the penal Statutes of the various States.

B. F. BROOKS,
H. G. NICHOLS,
Of Counsel.

115-413

IN THE

SUPREME COURT OF THE UNITED STATES.

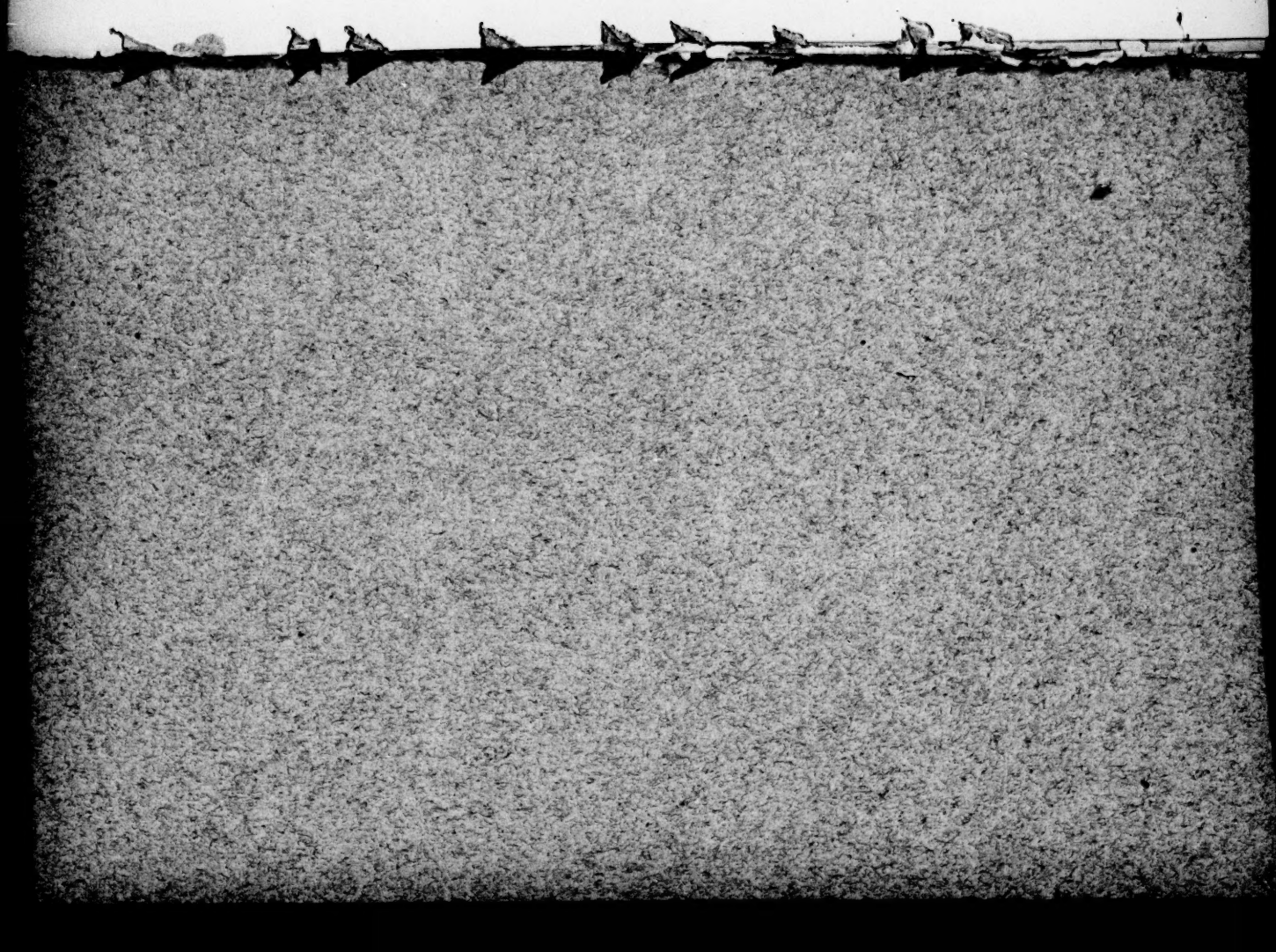
THE STATE OF ALABAMA

v.

ISAAC T. BURR, SAMUEL A. CARLTON, JOHN DEMERITT, J. C. STANTON AND D. N. STANTON.

ORIGINAL NO. 4.

BRIEF FOR SAMUEL A. CARLTON, ONE OF SAID DEFENDANTS, ON HIS DEMURRER IN SAID CAUSE.



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ONE OF SAID DEFENDANTS IN SAID CAUSE.

I. This defendant demurs, first, generally.

Attention under this assignment is requested to the objection pointed out in the close of this defendant's seventh cause of demurrer, to wit: —

"It is not alleged in said declaration that this defendant did any of the acts or things therein complained of, or was in fact an incorporator, or was ever an officer, director or stockholder in or an actual manager or controller of said company (Alabama and Chattanooga Railroad), or in respect of his liability in which, if any, of said capacities said action is brought."

(See declaration, first complete paragraph, page 8 *et post.*)

II. The second cause runs to the jurisdiction of this court.

It is submitted that this is a good cause of demurrer to the action, so far as the action is founded upon statutory liability imposed by the State of Alabama to be enforced in the courts of that State; and it is further submitted that no other liability is alleged here, since the declaration concludes, "Whereby and by force of said acts (reciting them) *an* action hath accrued," etc.

III. If the last-named cause of demurrer be not sufficient, it is because there is more than one cause of action alleged in the declaration; and if that be so, the declaration is bad for the reasons shown in this defendant's third and sixth causes of demurrer; that is, for the reason that two or more causes of action cannot be alleged in the same count; and the declaration contains but one count.

IV. The force of the last objection will be appreciated if this defendant's fourth, fifth, seventh, eleventh, twelfth, thirteenth, fifteenth and sixteenth causes of demurrer be considered in connection therewith, and in instance and illustration thereof.

It appears that said count alleges divers wrongs committed, as well successively as concurrently without locality, in various capacities and under different sanctions and liabilities, whereby there may not only be more than one cause of action against every defendant, but some causes peculiar to each or several defendants only; and each cause may involve a different combination of defendants, so that neither rules of evidence could be regarded, nor issues formulated or verdicts and judgments rendered, with just regard to the respective rights of the defendants.

V. The objection under consideration is further supported by this defendant's eighth, ninth and tenth causes of demurrer, for some of said alleged causes of action appear to be several, and others joint.

If the defendant's liability is several, there is a clear misjoinder; if joint, it is equally clear that there is nonjoinder; for the declaration only alleges that the defendants were "the majority and controlling incorporators, officers, directors and stockholders, as well as the actual managers and controllers of said Alabama and Chattanooga Railroad Company."

The company, also, in that view should be joined, and in some respects the powers of a court of equity would be requisite to do justice.

VI. This defendant's fourteenth assigned cause of demurrer is that the alleged causes of action vested in the receiver and assignees in bankruptcy of the railroad company. This is true of all claims available as assets to the creditors of the road; for it is the duty, and therefore within the power, of both a receiver and an assignee to collect all such claims.

It is respectfully asked that the force of this objection be tested upon the hypothesis that the assignee in bankruptcy of said road has recovered judgment and satisfaction against some, and for valid considerations has released others, of these defendants, on the same causes of action alleged in this declaration.

VII. (Further of the second, thirteenth and sixteenth causes of demurrer.) If the last objection be well taken, the only right of action left in the State is to recover a penalty under her statutes, and that can only be done in her own courts.

The first statute on which the plaintiff relies is that approved Feb. 19, 1867, Sect. 6.

SECT. 6. *Be it further enacted*, That it shall be the duty of the Governor, from time to time, when there shall be reliable information given to him that any railroad company shall have fraudulently obtained the endorsement of its bonds by the Governor on the part of the State, or shall have obtained the endorsement contrary to the provisions of this Act, or shall have sold or disposed of the bonds endorsed by the Governor, for a less sum than ninety cents in the dollar, he shall notify the attorney general of the State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the circuit or chancery court of the county of the place of business of the company, setting forth the facts; and when the fact shall satisfactorily appear to the court that the endorsement of any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this Act, or that said bonds shall have been sold or disposed of for a less sum than ninety cents in the dollar, then and in such case, the court shall order, adjudge and decree that said road lying in the State, with all the property and assets of said company, or a sufficiency thereof, shall be sold, and the proceeds thereof shall be paid

into the treasury of the State; and it shall be the duty of the comptroller immediately to invest the same in State bonds, or the bonds endorsed by the Governor, under the provisions of this Act, creating a sinking fund as provided for in the eleventh section of this Act; and said company shall forfeit all rights and privileges under the provisions of this act. And the stockholders thereof shall be individually liable for the payment of the bonds the endorsement of which was so fraudulently obtained by such company, or which were sold or disposed of for less than ninety cents in the dollar, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of or opposed the perpetration of such fraud by the company.

It was contemplated by this statute that, in the event of the commission of any of the acts prohibited, the road should be sold, and the proceeds taken by the State to pay the bonds, which bonds, however, the State, by indorsing, undertook to pay, whether the proceeds were sufficient or not, and would thereby come into possession of them.

Wherefore, in that event, it would have been just to amend the statute by construction, inserting the words "*to the State*" after the words "the stockholders thereof shall be individually liable for the payment of the bonds"; but if the State has not sold the road or otherwise pursued the remedies provided, and has not paid the bonds, and has not any bonds, can she now go into another court than that expressly established, and ask that this, in effect, criminal statute be amended by construction so as to incorporate the words "*to the State*," whereby, by the infliction of this unalterable penalty, she recovers five times as much as she paid in the adjustment of her own liability, against one, any or as many of the stockholders as she may severally, jointly or successively attack?

With the foregoing alleged liability eliminated, and on consideration of the relaxation extended by the Act of Sept. 22, 1868 (Exhibit B), in behalf of the Wills Valley Railroad Company, of the general restriction as to the application of the proceeds of indorsed bonds, it is doubtful if any cause of action could be gathered from the remaining matters in the declaration.

The remaining liability of the section (§ 6, Act of Feb. 19, 1867), as follows, —

"For all other losses that may fall upon the State in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of or opposed to the perpetration of such fraud by the company."

also requires the insertion of the words "*to the State*," and omission of the words "to the said Court."

This confers expressly a separate or "other" causes of action in which causes the company is the party that should be primarily responsible, and the stockholders for contribution only; bad management by the State is a good defence to it, and the State can recover only for the loss which results from pursuing the remedies provided, and these remedies were clearly abandoned. Perhaps the whole procedure, and certainly the statement of the cause of action, should be substantially amended to enable recovery on this ground.

VIII. (Further of the eleventh and fifteenth cause of the demurrer.)

The liability so far considered is that of stockholders only. The Act of Feb. 11, 1870, provides —

"That the directors or other officers, and incorporators, and stockholders of said railroad company who shall knowingly violate or permit the violation without objection, any provision of this Act or of the Act under which said Company *is now receiving* the endorsement of the State upon its bonds of sixteen thousand dollars per mile, shall be held personally liable to the State for any loss incurred thereby."

This legislation, which recognizes that it refers to bonds then "being issued," is, so far as it relates to bonds already issued, ineffectual, and the declaration makes no distinction as to acts or parties before and after that date.

SAMUEL A. CARLTON.

By his Att'y, JOHN C. COOMBS.

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Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 4, ORIGINAL.

The State of Alabama vs. Isaac T. Burr, et als.

SUPPLEMENTAL BRIEF FOR PLAINTIFF ON ARGUMENT OF DEFENDANT'S DEMURRER TO DECLARATION.

BY H. C. TOMPKINS, SAM'L F. RICE, & E. S. MANSFIELD,

ATTORNEYS FOR PLAINTIFF.

Supreme Court of the United States.

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THE STATE OF ALABAMA, vs. ISAAC T. BURR, ET ALS.

SUPPLEMENTAL BRIEF FOR PLAINTIFF ON ARGUMENT OF DEFENDANT'S DEMURRER TO DECLARATION.

On the oral argument in this court, it appeared that there was misapprehension as to the nature and meaning of the State aid statutes of Alabama which form parts of the plaintiff declaration, as well as of the nature and meaning of the declaration itself. Such misapprehension and the importance of this cause justified this court in granting the leave under which the plaintiff files this supplemental brief.

The State aid statutes of Alabama set forth as parts of the declaration, belong to that class of laws, "which amount to propositions on the part of the State, which, if accepted by individua's (or corporations), will become binding contracts." Cooley's Const. Lim. 4th Ed., marginal page 284.

The acceptance by the Alabama & Chattanooga Railroad Company of the State aid under those statutes, amounted to an acceptance of and assent to the terms upon which these statutes offered the State aid, including the individual liability of the stockholders," so clearly expressed and strongly marked amongst the several and cumulative provisions of

these statutes for indemnity of the State against loss. This personal liability of the stockholders was "one of the terms" of the State endorsement authorized by the statute, as well as of the State loan authorized by the statute. "This liability is virtually and in effect, a liability upon a contract and the mutual agreement of the parties; not, indeed, in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions *or implied* assent of the parties." Hawthorne v. Calef, 2 Wallace, 10, 22; Corning v. McCullough, 1 Comstock, 47; Flash v. Conn. 109 U. S. 374, 379; Chase's Blackstone, 2d Ed. top page, 712.

By the unambignous words of section 6, of the statute of Feb. 19th, 1867, set forth on page 35 of the declaration, the stockholders of the company are declared individually liable for the payment of the bonds the endorsement of which was so fraudulently obtained by such company, *or, which were sold or disposed of for less than ninety cents in the dollar*, and for all other losses that may fall upon the State in consequence of the commission of *any other fraud* by such company, excepting such stockholders, as may show to the said court that they were ignorant of or opposed the perpetration of *such fraud* by the company.

By the plain words of said section 6, of the statute, the *sale* or *disposition* by the company of any of the endorsed bonds for less than ninety cents in the dollar, without regard to the intent, constituted a fraud of the company; and is set forth in the statute as one of the specific frauds of the company, for the commission of which the stockholders should be individually liable for any loss that might fall upon the State in consequence of its commission.

The liability of stockholders thus declared by section 6, of said act of February 19th, 1867, was left untouched and unaffected by the amendment of that act approved September 22d, 1868, which is set forth on pages 26 to 31 of the declaration, as well by the act relating to the Wills Valley Railroad company and the North-east and South-west

Alabama Railroad Company, which is set forth on pages 41 to 45 of the declaration.

The act of Sept. 22d, 1868, amends only the *first* and *third* sections of the act of 1867; and amends said first and third sections only in the following particulars, to-wit: 1st, in increasing the rate of the State endorsement of the bonds of the company from $12,000 per mile to $16,000 per mile; 2d, in authorizing the State endorsement in favor of a corporation chartered by Alabama which had finished, equipped and completed twenty continuous miles of its railroad "outside of the State of Alabama, and extending in the direction of its terminus within this State;" whereas original section 1 of the act of 1867, had confined the State endorsement "for each mile thereafter constructed "*within the limits of the State*;" 3rd, in providing that such notification as is alleged on pages 8 and 9 of the declaration, and is described in section 2 of the act of September 22d, 1868, should amount to a contract to the extent set forth in that section.

It is true, that by the last proviso in the first section of the act of September 22d, 1868, the provisions of that section, "relating to the extension of railroads *beyond the limits of this State*," were confined to the Wills Valley Railroad Company. And because these provisions were confined to that company, the same legislature subsequently, but at the very same session, passed the act of November 17 1868, in which, among other things, the same provisions as to State indorsement were made applicable to the corporation which should own the franchise of the said Northeast and Southwest Alabama Railroad Company at the period when "twenty continuous miles of the Northeast and Southwest Alabama railroad, commencing at its southwestern terminus at *Meridian in Missi-sippi*," should be finished, equipped, and completed." (See page 44 of the Declaration.)

As the legislature of Alabama, not long after its act of September 22d, 1868, provided for the union of the Wills Valley Railroad Company and the Northeast and Southwest Alabama Railroad Company, under the name of the Ala-

bama and Chattanooga Railroad Company, and as each of these companies, whose union was provided for by the legislature, owned a railroad twenty miles or more of which was "*beyond the limits of Alabama*," it was natural and reasonable that the legislature should, by its act of November 17, 1868, extend the same benefit of State indorsement to the owners of the Northeast and Southwest Alabama Railroad, which had been conferred on the owners of the Wills Valley railroad by the act of September, 1868.

But it is certain that none of the acts herein above cited, impaired or affected the liability of stockholders as declared in section 6 of the act of 1867.

By the act of February 11, 1870, set forth on pages 45 to 48 of the Declaration, further or additional State aid by a loan of two millions of dollars of Alabama State bonds, was offered to the Alabama and Chattanooga railroad company on the terms therein set forth. The company was not bound to accept the loan on the prescribed terms; but the acceptance of the loan under that act, amounted to an acceptance of the terms of the loan prescribed in the act; and imposed upon the company as well as its stockholders and directors, the duty and obligation not to "knowingly violate, or permit the violation of, without objection, any provision of that act, or of the act under which" the company was then receiving the indorsement of the State upon its bonds of sixteen thousand dollars per mile; and for any such violation, as well for any such permitted violation, the stockholders as well as the directors, became personally liable to the State for any loss incurred thereby.

The liability of stockholders, declared in the act of 1867, and in the act of 1870, is not one created by mere force of law without the assent, express or implied, of those against whom it is declared. It could only come into existence and operation by their assent, express or implied; which assent is manifested by the acceptance of the aid or loan offered by the statutes upon the terms prescribed in the statutes. Such statutes as these, which acquire their operative force

from the assent of the persons to whom they relate, and which alter, enlarge, modify, or confer a remedy for existing legal rights, are valid exercises of legislative power.—The People vs. Tibbetts, 4 Cowen, 384; Baugn vs. Nelson, 9 Gill, 299.

Frauds are of two classes; that is, they are *actual or constructive.* The State aid statutes were obviously designed to protect the State against both classes, and to make stockholders individually liable to the State for losses to it, in consequence of any fraud of either class committed by the corporation.

One of the terms upon which the State endorsed the bonds of the company and loaned the bonds of the State to the company, was, that the bonds should not be used for any other purpose than the construction and equipment of the railroad of the corporation receiving such State aid (pages 34 and 47 of the declaration). The company could not do as it pleased with these endorsed and borrowed bonds, as an ordinary holder of paper endorsed by another, or as an ordinary borrower of State bonds might do. By accepting the endorsement and bonds of the State, upon *the peculiar and extraordinary terms* prescribed in the aforesaid statutes, it assumed the duties and obligations of a trustee and became a trustee to the following extent, that it would not divert, nor permit the diversion of, any of either class of bonds, or of the proceeds thereof, from the sole purpose of the construction and equipment of its railroad (upon which the State had a paramount lien and was therefore interested in having its value increased by completion and equipment). The acceptance of the State aid by the corporation upon these peculiar terms, established peculiar relations between the State and the corporation as well as its stockholders, which may well be called relations of trust and confidence, and created new and peculiar duties and obligations upon the part of the corporation as well as its stockholders, towards the plaintiff. And in view of these new relations and duties, the several diversions of the bonds as well as

of their proceeds which are alleged in the declaration, are not only violations of statute and of contract, but plain breaches of trust, and *frauds, actual or constructive*, on the part of the corporation and all others who knowingly participated in such diversions of the bonds or their proceeds; and *especially* upon the part of those, who, like the defendants, during the entire period of such wrong-doing, "were the majority and *controlling* incorporators, officers, directors, and stockholders, as well as *the actual managers and controllers* of the said Alabama and Chattanooga Railroad Company," the corporation which accepted said State aid as aforesaid (page 8 of declaration).—Thompson's Liability of Officers and Agents of Corporations, 398 *et seq.;* Bank of St. Mary's v. St. John, 25 Ala. R. 566.

The statutes which show the peculiar relations which came into existence between the plaintiff and the Alabama and Chattanooga Railroad Company as well as its stockholders, by the acceptance of the State aid under these statutes, are set forth in the declaration, as well as the acceptance of the State aid by that corporation under those statutes. And as these facts and relations are disclosed in the declaration, the several acts of the corporation set forth in the declaration in diverting as well as in wasting and misapplying the bonds as well as their proceeds, cannot be characterized otherwise than as *frauds*—and as *frauds to the prejudice of plaintiff*, in rendering the corporation insolvent and bankrupt, and compelling the plaintiff to pay large amounts on these bonds and the interest due thereon, which amounts are wholly lost to plaintiff and never can be collected out of the bankrupt corporation, all of whose property has been disposed of without paying any part of these losses of plaintiff.

To sell or dispose of any endorsed bond for less than 90 cents on the dollar, was not only a fraud as hereinabove stated, but was also a violation of a provision of each of the acts mentioned in the State endorsement set forth on page 11 of

the declaration, to-wit: the act of 1867, the act of September 22d, 1868, and the act of Nov. 17th, 1868; these being the three acts under which the State endorsement was made.

To sell or dispose of for less than ninety cents on the dollar, any of the two millions of dollars of State bonds loaned to the company under the act of February 11th, 1870, was a violation of a provision of that act.

The above mentioned instance or example of a fraud as well as of a violation of a provision of each of the four statutes last above mentioned, is given by way of example. Such a fraud as well as such a violation of the statutes is very clearly stated in the declaration. Several other frauds, as well as several other violations of the last mentioned statutes, are clearly stated in the declaration; all of which are admitted by the demurrers to the declaration. In connection with averments of these frauds and violations of these statutes, is the averment of continuous fraudulent concealment of the same by the defendants and of the inability of plaintiff to state the same more fully than in the declaration, and also the averment, that during the whole period the defendants have been and were the controllers of the company and the majority of the stockholders and directors, and also the averment that by the said frauds and violations of the said statutes stated in the declaration, the corporation was driven into bankruptcy and rendered unable to pay the past due or accruing interest on the bonds of the corporation endorsed by the State or on the State bonds loaned to the corporation, and that thereby the State has been forced to pay and has paid the several specified installments of interest on all the bonds endorsed and loaned aggregating $537,600, "*which the State would not have been compelled to pay but for the wrongful, illegal, and fraudulent acts of the said defendants and said corporation as aforesaid*, no part of which sum of five hundred and thirty-seven thousand and six hundred dollars has ever been repaid to the plaintiff; and by reason of the aforesaid wrongful, illegal and fraudulent acts of the said Alabama & Chattanooga Railroad Company and of the said de-

fendants as aforesaid, the said plaintiff has been further damnified and injured to *the additional extent* of one million of dollars *in settling her liability created and evidenced* by her aforesaid endorsement of said endorsed bonds, *no part of any of which loss* or damage has ever been paid to the plaintiff."

The plaintiff sues only to obtain indemnity; and after having set forth in the Declaration the aforementioned statutes, the terms offered by them and accepted by the corporation, the frauds committed by the corporation and the violations of these statutes, permitted and participated in by the defendants, and the consequent bankruptcy of the corporation and actual losses to the plaintiff by reason thereof, avers the conclusion, (which is the legal and proper conclusion) that by these facts thus averred and by force of the act of February 19, 1867, the act of September 22, 1868, the act of November 17, 1868, and the act of February 11, 1870, the plaintiff has a legal claim against the defendant stockholders for indemnity.—See Reed vs. Northfield, 13 Pick. 94, 101.

In many of the cases cited for defendants, the obligation of the stockholders was a *collateral* statutory obligation; which is very different from the *direct* statutory obligation assented to by the present defenants.—Ballard v. Ball, 1 Mason, 243; McCarthy v. Lavasche, 89 Illinois, 720, and cases there cited; Avenz v. Weir, 89 Illinois, 25; Jacobson v. Allen, 12 Federal Reporter, 454.

Flash v. Conn, 109 U. S. 379, *et s q.*, as well as the current of authorities, shows that to entitle the plaintiff to maintain the present action, no suit against the corporation was necessary, although the corporation may have been liable as well as the defendants.

The damages which the statutes authorize the plaintiff to claim and which are claimed in this case, constitute "a *legal* as contradistinguished from an *equitable* claim, and are recoverable *at law*, in an *action on the case*, as in ordinary cases of damage sustained by one person in consequence of a

fraud practiced on him by another."—Raymond v. Sturges, 23 Connecticut, 145.

Reed v. Northfield, 13 Pick. 94, was *an action on the case* against the town of Northfield, for injury sustained by the plaintiff, by the insufficiency of a highway. Chief Justice Shaw delivered the opinion of the court, in which, among other things he said: "We think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is, that it (a penal prosecution) is prosecuted for *the purpose of punishment* (not of indemnity), and to deter others from offending in like manner." "Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him *enhanced* damages; but still they are recoverable *to his own use, and in form and substance the suit calls for indemnity.*" * * * That case, in principle, is sustained by the subsequent cases of Mitchell v. Clapp, 12 Cush. 278, and La Forrest v. Tolman, 117 Mass. 10 ', and Corning v. McCullough, 1 Comstock, 65, 66; Carver v. Braintree Manuf. Co., 2 Story R. 132, 449; see, also, Cuykendall v. Miles, 10 Federal Reporter, 342, in which Mr. Justice Lowell exposes the *obiter dicta* of a former distinguished member of this court.

In accord with Reed v. Northfield is Stanley v. Wharton, 9 Price, 301.

Not only is each of the statutes attached to the declaration a remedial statute, but the present action is, in form and substance, a remedial action, claiming only indemnity for losses sustained by the plaintiff in consequence of the frauds of the corporation and the violations of those statutes, as shown by the averments of the Declaration. And the sufficiency of the Declaration is demonstrated by the cases last above cited, as well as by the authorities generally.—Gilbert v. Myers, 18 Ala. R. 467; Blick v. Briggs, 6 Ala. R. 687; Chase's Blackstone, 2d ed., top page. 716, note 6, and also top page, 637; Ellis v. Davis, 109 U. S. 497,

and cases therein cited; Raymond v. Sturges, 23 Connecticut, 134; Monroe v. Pritchett, 16 Ala. R. 585.

According to the authorities, there is no duplicity in the Declaration.—1 Chit. Pl. 16 Am. Edition, 249 and notes.—Raymond v. Sturges, 23 Conn. 145-147.

It is settled by the Supreme Court of Alabama, that the State of Alabama is liable by virtue of its indorsement, to an innocent holder for value of the bonds of over issue of the corporation, the State indorsement of which was procured by the fraud of the corporation as averred on pages 9 to 11 of the Declaration.—The State, *ex rel.* Plock & Co. v. Cobb, 64 Ala. Rep. 127.

The same Supreme Court has also settled it, that there is nothing in any of the State aid statutes negativing the jurisdiction of any court not therein mentioned, or, "*tying the State down to particular remedies.*"—Forrest v. Ludding-ton, 68 Ala. R. 13; see, also, Sedg. on Stat. & Const. 2d ed. p. 342; Barber v. Crocker. 10 Pick. 383; Crittenden v. Wilson, 5 Cowen, 165; Rockford v. Hood, 7 Term, 620.

The constitution of the United States, Art. III, §§ 1 and 2, gives this court original jurisdiction in all cases in which a State is a party. Section 687 of the U. S. Revised Statutes provides that the Supreme Court shall have original jurisdiction of all controversies of a civil nature between a State and citizens of other States. And, in the language of this court, "if by the law obtaining in the State, customary or statutory, they can be maintained in a State Court, whatever designation that court may bear, we think they may be maintained by original process in a Federal Court where the parties are" on the plaintiff's side, a state, and on the other or defendant's side, citizens of other States.—Gaines v. Fuentes, 92 U. S. 20; Ellis v. Davis, 109 U. S. 497, and cases therein cited.

In the administration of State laws, the jurisdiction given to this court by the constitution, is not restricted "to the very rights and remedies then recognized and employed, but embraces as well *not only rights newly created by statutes*

of the States * * * * but *new forms of remedies* to be administered in the courts of the United States," &c., &c., Ellis v. Davis. 109 U. S. 497. Dennick v. Railroad Company, 103 U. S. 17, approved in Flash v. Conn., 109 U. S. 379.

These last cited cases as well as others above cited, show that this is "a civil action to recover damages for a civil injury," which involves a controversy of a civil nature between a State as plaintiff and citizens of other States as defendants; and therefore within the original jurisdiction of this court.

It was not essential that the declaration should aver that the defendants had notice of the frauds of the corporation which are therein alleged. But the declaration (p. 22) avers not only notice to them of the frauds of the corporation, but that the defendant "permitted and participated" therein. If want of such notice can be made available to the defendants, it must be by way of defence in *averring and proving* "that they were ignorant of or opposed the perpetration of such fraud by the company." (Page 35 of declaration.)

The distinction between matter essential to make the declaration good and matter *to be set up in defence*, must be observed.

In the original brief of plaintiff, there is an inadvertent omission to notice the paragraph of the declaration on page 20 and running over on page 21. That paragraph sufficiently sets forth one of the frauds committed "by the company with the knowledge and permission of said defendants."

If by any possibility there is any defect in the declaration, and such defect can be removed or cured by amendment, the plaintiff respectfully asks leave to make such amendment, as soon as such defect shall be pointed out.

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